TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. [redacted] 8

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

P. R. ANDREWS, CLYDE GOING, R. E. JEFFREY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED JULY 23, 1907.

(20,811.)

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SUPREME COURT OF THE UNITED STATES.

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No. 408.

THE WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

P. R. ANDREWS, CLYDE GOING, R. E. JEFFREY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 7, 1907.

1 Be it remembered, That on the 28th day of May, 1907, came into the office of the Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, the Western Union Telegraph Company by George H. Fearons, Henry D. Estabrook, Rush Taggart and Rose, Hemingway, Cantrell and Loughborough, Esqs., its solicitors and filed therein on the chancery side of said court its bill for injunction against Prince R. Andrews, Prosecuting Attorney for the first circuit of the State of Arkansas; Clyde Going, Prosecuting Attorney for the second circuit; Robert E. Jeffery, Prosecuting Attorney for the third circuit; Daniel B. Horsley, Prosecuting Attorney for the fourth circuit; Henderson M. Jacoway, Prosecuting Attorney for the fifth circuit; Lewis Rhoton, Prosecuting Attorney for the sixth circuit; Henry B. Means, Prosecuting Attorney for the seventh circuit; Oscar A. Graves, Prosecuting Attorney for the eighth circuit; John S. Lake, Prosecuting Attorney for the ninth circuit; Byron L. Herring, Prosecuting Attorney for the tenth circuit; William D. Jones, Prosecuting Attorney for the eleventh circuit; Andrew A. McDonald, Prosecuting Attorney for the twelfth circuit; Hampton S. Powell, Prosecuting Attorney for the thirteenth circuit; Gardner Fraser, Prosecuting Attorney for the fourteenth circuit; James Cochran, Prosecuting Attorney for the fifteenth circuit; Thomas I. Herrn, Prosecuting Attorney for the sixteenth circuit, and Frederick E. Brown, Prosecuting Attorney for the seventeenth circuit, which complaint is in words and figures as follows, to-wit:

United States Circuit Court for the Eastern District of Arkansas, Western Division.

2 The Western Union Telegraph Company, Complainant,
against
Prince R. Andrews, Prosecuting Attorney for the First Circuit of the State of Arkansas; Clyde Going, Prosecuting Attorney for the Second Circuit; Robert E. Jeffery, Prosecuting Attorney for the Third Circuit; Daniel B. Horsley, Prosecuting Attorney for the Fourth Circuit; Henderson M. Jacoway, Prosecuting Attorney for the Fifth Circuit; Lewis Rhoton, Prosecuting Attorney for the Sixth Circuit; Henry B. Means, Prosecuting Attorney for the Seventh Circuit; Oscar A. Graves, Prosecuting Attorney for the Eighth Circuit; John S. Lake, Prosecuting Attorney for the Ninth Circuit; Byron L. Herring, Prosecuting Attorney for the Tenth Circuit; William D. Jones, Prosecuting Attorney for the Eleventh Circuit; Andrew A. McDonald, Prosecuting Attorney for the Twelfth Circuit; Hampton S. Powell, Prosecuting Attorney for the Thirteenth Circuit; Gardner Fraser, Prosecuting Attorney for the Fourteenth Circuit; James Cochran, Prosecuting Attorney for the Fifteenth Circuit; Thomas I. Herrn, Prosecuting Attorney for the Sixteenth Circuit, and Frederick E. Brown, Prosecuting Attorney for the Seventeenth Circuit, Defendants.

Original Bill.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Arkansas:

The Western Union Telegraph Company, a corporation duly

organized under the laws of the State of New York and a citizen and resident of said State, having its principal place of business in the State of New York, and in the Southern District thereof, brings this its bill of complaint against the defendants, Prince R. Andrews, prosecuting attorney for the first circuit of the State of Arkansas, Clyde Going, prosecuting attorney for the second circuit, Robert E. Jeffery, prosecuting attorney for the third circuit, Daniel B. Horsley, prosecuting attorney for the fourth circuit, Henderson M. Jacoway, prosecuting attorney for the fifth circuit, Lewis Rhoton, prosecuting attorney for the sixth circuit, Henry B. Means, prosecuting attorney for the seventh circuit, Oscar A. Graves, prosecuting attorney for the eighth circuit, John S. Lake, prosecuting attorney for the ninth circuit, Byron L. Herring, prosecuting attorney for the tenth
3 circuit, William D. Jones, prosecuting attorney for the eleventh circuit, Andrew A. McDonald, prosecuting attorney for the twelfth circuit, Hampton S. Powell, prosecuting attorney for the thirteenth circuit, Gardner Fraser, prosecuting attorney for the fourteenth circuit, James Cochran, prosecuting attorney for the fifteenth circuit, Thomas I. Herrn, prosecuting attorney for the sixteenth circuit, and Frederick E. Brown, prosecuting attorney for the seventeenth circuit, citizens and residents of said State of Arkansas, some of them residents of the Eastern District and Western Division thereof, and says:

This case is one wholly between citizens of different States, and that the subject matter thereof and the amount in controversy is of the value of more than two thousand dollars ($2,000.00) exclusive of interest and costs, and is also one arising under the Constitution and Laws of the United States, in that your orator the Western Union Telegraph Company asserts rights and privileges under Acts of Congress and the Constitution and Laws of the United States against defendants and each of them.

Second. That your orator the Western Union Telegraph Company is a telegraph company, and a corporation duly organized under an Act of the Legislature of the State of New York entitled, "An Act to provide for the incorporating and regulating of telegraph companies," passed on the 12th day of April 1848.

Third. Your orator further says, that the Congress of the United States passed an Act Approved July 24th, 1866, entitled, "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes."

That by a further Act of Congress, approved June 10th,
4 1872, entitled, "An Act making appropriation for sundry civil expenses for the government for the fiscal year ending June 30th, 1873, and for other purposes," all telegraph companies accepting the provisions of the Act approved July 24th, 1866, were required to transmit for the Secretary of War of the United States the result of observations of signal stations and reports for the Weather Bureau Department for the Government of the United States, under severe penalties fixed and defined by said act last named.

Fourth. Your orator further says that complying with the pro-

visions of said Act of Congress, approved July 24th, 1866, it did, on or about the 8th day of June, 1867, duly file with the Postmaster General of the United States its written acceptance of all the restrictions and obligations of the said Act, and thereupon your orator became entitled to all the rights and privileges conferred by said Act, and burdened with all the obligations imposed by said Act, and that it has, at all times since the filing of said written acceptance, fully performed all obligations and requirements of said Act, and has, as part of the postal equipment of the United States and an instrumentality of the Postal Department of the United States, carried upon its lines of telegraph messages for the Government of the United States, for the several departments thereof, and for the people of the United States and of the State of Arkansas, as prescribed and required in and by the provisions of said Act.

Fifth. Your orator further says that it was organized as a telegraph company in the year 1851, and immediately thereafter begun the work of construction and operation of telegraph lines in the State of New York and other States, and has continuously since that time been engaged in the work of constructing and op-
5 erating telegraph lines for the rapid dissemination of intelligence, and has constructed and acquired a continuous system of telegraph lines which now extend through the States and Territories of the United States, and into the borders of the Dominion of Canada, and connect with the telegraph lines in the Republic of Mexico, and through the said lines of Mexico, with the telegraph lines of the Central and South American Republics; and also connect by means of submarine cables with the telegraph systems of foreign countries; that at the present time its said system of telegraph lines, operated and controlled by it as aforesaid, comprises over 192,000 miles of poles and cables, and over 900,000 miles of wire; that upon the said system of telegraph lines your orator has over 23,000 offices, and transmits yearly about 65,000,000 messages, for the public and for the government of the United States and for the governments of foreign countries, exclusive of messages transmitted upon regular business, and exclusive of messages for your orator, and exclusive also of messages forwarded by private parties leasing wires from your orator; that said system of lines has been built up so as to connect with and be largely operated from the central office of your orator which is situated in the City of New York, and the said lines radiate therefrom to all the important cities and commercial centres and to many thousand towns and villages in the United States and North America, and through ocean cables, land lines above described, to all the important commercial centres of this Country and the continent of Europe, and through lines there situated with the telegraph lines in all parts of the world; that among the lines of telegraph forming a component part of the said system of your orator, and connected with its main office afore-
said, in the City of New York, are telegraph lines within the
6 said State of Arkansas, most of which lines have been constructed in said State since the acceptance by your orator of the terms and conditions of said Act of Congress approved July

24th, 1866. That the complainant's said line of telegraph within the State of Arkansas are upon the public domain and upon the military and postal roads of the United States only and the complainant's said line of telegraph are part of the postal routes and part of the postal establishment of the United States and as such the complainant has, under the Constitution and Laws of the United States, the power and is under the duty and obligation to transmit all messages for the Government and for the public generally just as much and as fully with respect to messages between points within the said State as with respect to interstate messages.

Sixth. That said lines of telegraph existing in the said State of Arkansas, and hereinbefore described, have been constructed by your orator with the consent and permission of the said State, and in accordance with the laws of the same, and your orator has invested in the said lines of telegraph now in said State more than $153,000.00; that continuously since the construction of said lines of telegraph your orator has used the said lines for the transmission of telegraph messages for the government of the United States and the several departments thereof, and for the public, as an instrumentality of the Postal Department and of commerce, wholly within the State of Arkansas, and also for interstate commerce and commerce between points in said State and foreign countries, and thus said telegraph lines have been continuously employed in domestic, interstate and foreign commerce since their construction; that your orator has complied with all the reasonable, just and valid provisions and requirements of the laws of the State of Arkansas at all times,

7 and is now complying in all respects with the reasonable, just and valid provisions and requirements of the laws of the said State, and expects and intends always so to do.

Seventh. On or about the 13th day of May, 1907, the Legislature of said State passed an Act entitled, "An Act to permit foreign corporations to do business in the State of Arkansas, and fixing fees to be paid by all corporations," and that on said date the said Act was approved by the Governor of said State, and it was provided in said Act that the same should go into effect and be enforced from and after its passage, a copy of which Act is hereto attached, marked Exhibit A and made part hereof. That one of the provisions of said Act is that every foreign corporation, before authority shall be granted to it to do business in said State, shall file with the Secretary of State a statement of its assets and liabilities, and the amount of capital employed in the State, and name an agent upon whom process may be served, and a resolution adopted by its Board of Directors consenting that service of process on any agent of said company in said State, or upon the Secretary of State, in any action brought or pending in said State, shall be sufficient service upon said company; and your orator says in conformity with the provisions of the said Act, it duly caused to be passed by its Board of Directors a resolution, and has tendered a duly authenticated copy of the said resolution and of said statement, and has offered to the Secretary of State all reasonable fees for the filing and recording of the said papers, but the said Secretary of State has refused and refuses

to file the same unless your orator will pay to the said Secretary of State the fee of $75.00 upon the first $100,000.00 of its capital stock, and $25.00 upon each additional $100,000. of its capital stock: that your orator has a total authorized capital stock under the laws of the State of New York representing its entire system of tele-
8 graph lines, properties and interests in ocean *a*cbles, real estate, etc. of $100,000,000. its real estate valued at several million dollars being situated wholly outside the State of Arkansas, and that the total sum demanded by the Secretary of State on account of this, its entire capital stock, as described, and to be paid to the said State of Arkansas as a condition of its right to do business within said State of Arkansas amounts to the sum of $25,050.00; that the said defendants claim to be acting under the authority of the said Act of the said State of Arkansas, passed on the 13th day of May, 1907, as hereinbefore set forth, and that without the payment of said sums said defendants claim the right to declare the complainant subject to the large penalties named in the said Act; your orator avers that the defendants, who are the prosecuting attorneys for the different counties of the State of Arkansas, and who by said Act are charged with the duty to institute suits in the name of the State for any violations of said Act, threaten and will, unless restrained by the order of this Honorable Court, proceed to institute legal proceedings against your orator and its agents in all the counties in the said State of Arkansas, and will endeavor thereby to subject your orator to the penalty of $1,000.00 for each day which it shall continue to do business in the said State after the passage of the said Act.

Eighth. Your orator further alleges that its said lines of telegraph located and constructed in said State, as hereinbefore set forth, and used by it for the purpose of domestic, interstate and foreign commerce, and of communicating among the people of the United States and the State of Arkansas, and for the business of the Government of the United States, are of value only as they can be used as they have been designed and planned to be used, and that the said
9 State of Arkansas has no power or authority to prevent your orator from using the same for foreign and interstate commerce, or for the transmission of messages thereon for the Government of the United States as a postal instrumentality and for speedy communication among the citizens of the State of Arkansas who desire to use the same for the transmission of intelligence, and that the said defendants' action will deprive your orator of the right to use the same as an agency of the Postal Department of the United States for the purposes for which the same was constructed if the said defendants are permitted to enforce the provisions of the said alleged Act of the State of Arkansas.

Ninth. Your orator further showeth unto your Honors that the gross income of your orator from its purely local and domestic business in the State of Arkansas has for ten years last past averaged about $32,000.00 a year, and that the cost to your orator for doing said amount of business has averaged at least $20,000.00 a year; that the amount of its capital devoted to or utilized in the trans-

action of such domestic and intra-state business would not exceed $153,000.00 that it pays to the State of Arkansas each and every year, as taxes upon its property in said State, about $12,000.00.

Tenth. Your orator further alleges that the said Act of the State of Arkansas is unconstitutional and void as to your orator, in that it further provides that upon your orator, exercising the right of a citizen of another State of instituting any suit or proceeding against any citizen of the State of Arkansas in the Federal Courts, shall be the duty of the Secretary of State to forthwith revoke all authority of your orator and its agents to do business in the said State, and to publish such revocation in some newspaper of general circulation, and thereupon to cause to attach to your orator a penalty of $1,000.00 for each days continuance of doing business in the State after such alleged revocation.

Eleventh. And your orator further alleges that the deprivation of the right to use the said telegraph lines for the transmission of messages over the same as the same are constructed and designed to be used, would almost entirely destroy the value of the same to your orator, for the reason that the said lines are solely to be used as the same are located and constructed, and if your orator were deprived of the right to use the same the material in many of the said lines would not pay the cost of taking down and removal of the same from the said State, and that your orator therefore alleges that the said Act is unconstitutional and void as to your orator, in that it seeks by its provisions to confiscate and destroy the value of the property of your orator without any provision for the compensation therefor to your orator, and therefore deprives your orator of the equal protection of the law, and takes the property of your orator without due process of law.

Twelfth. And your orator further alleges that the said Act of the Legislature levies an unequal burden upon your orator as compared with the corporations of the said State, in that domestic corporations organized and existing at the time of the passage of the said law are not required to pay into the said treasury of the State any sum whatever upon the capital stock of the same, but said domestic companies may continue their business without the payment of any sum, while the foreign corporations, including those which, like your orator, are already established in this State, under the protection thereof, are required to pay a large sum measured by their entire capital stock for the privilege of continuing their established and existing business, whether the same relates to domestic commerce, or interstate or foreign commerce, or not.

Thirteenth. Your orator further alleges that in and by the said Act it is provided that in case of the failure to pay the said exaction above named, on account of the capital stock employed in the State and its capital stock, employed out of the State, your orator is forbidden to make any contract within the State, enforceable in law or equity, whether the same relates to domestic, interstate or foreign commerce and as an agent of the United States to make contracts within the said State of Arkansas, and in attempting to invalidate all

contracts of every nature and description make by your orator in the performance of its duties to the Government of the United States and to the public; and in so providing the said Act is unconstitutional and void, in that it deprives your orator of the equal protection of the law, and undertakes to lay a burden upon all the property of your orator, whether within the said State of Arkansas, or without the said State of Arkansas, and seeks to enforce an illegal exaction from your orator for the privilege of using its property for the transaction of its business as an agency of the Postal Department of the United States, and as an instrumentality of domestic, interstate and foreign commerce.

Fourteenth. Your orator further says that it originally entered the State of Arkansas and constructed its lines of telegraph and operated the same as hereinbefore described with the consent of the said State of Arkansas some thirty or forty years ago, and during all the intervening years has continued to extend and operate its lines of telegraph within said State with the consent of said State, and said State from time to time through its legislative enactments has recognized the rights of your orator to transact the busi-
12 ness aforesaid in the State of Arkansas and from time to time has passed laws regulating the conduct and affairs of your orator's business in said State, as shown by numerous statutes to which your orator begs leave to refer; and your orator avers that it is now, and for more than thirty years last past has been, a foreign corporation, doing business in said State with the full knowledge and acquiescence of said State, and in reliance upon such license and acquiescence has expended large sums of money in said State for the purpose of transmitting messages between the people of said State, to-wit, the sum of $153,000.00, and your orator avers that said State may not withdraw its said license from your orator and expel it from said State; and that the enactment of the legislature of said State of May 13th, 1907, herein complained of, impairs the obligation of the contract created as aforesaid between the said State and your orator, and so violates the Constitution of the United States.

Forasmuch, therefore, as your orator can have no adequate relief except in this Court, and to the end that the defendants hereinbefore named may, if they can, show why your orator should not have the relief hereby prayed, make full disclosure of all the matters aforesaid, from the best of their knowledge and belief, a full, true and perfect answer make, to matters hereinbefore stated and which affect them, answer under oath being expressly waived, your orator prays that the Court will determine, adjudge and decree that the said Act of the State of Arkansas, approved May 13th, 1907, entitled, "An Act to permit foreign corporations to do business in Arkansas, and fixing fees to be paid by all corporations," shall be adjudged and decreed to be unconstitutional, illegal and null and void, that said defendants, or their agents, be restrained, and enjoined
13 from attempting to collect the said fee of $25,050.00 in said State, and from attempting to enforce any penalties alleged to have accrued under and by virtue of the provisions of the statute

of Arkansas aforesaid, or from enforcing any of the provisions of said Act, save and except the appointment of an agent in said State, upon whom process may be served in actions brought against the Western Union Telegraph Company, and for such other and further relief as the case may require, and to your Honors may seem just.

May it please your Honors to grant unto your orators a writ of subpœna directed to each of the defendants, namely, Prince R. Andrews, as prosecuting attorney for the first circuit of the State of Arkansas, Clyde Going, as prosecuting attorney for the second circuit, Robert E. Jeffery, as prosecuting attorney for the third circuit, Daniel B. Horsley, as prosecuting attorney for the fourth circuit, Henderson M. Jacoway, as prosecuting attorney for the fifth circuit, Lewis Rhoton, as prosecuting attorney for the sixth circuit, Henry B. Means, as prosecuting attorney for the seventh circuit, Oscar A. Graves, as prosecuting attorney for the eighth circuit, John S. Lake as prosecuting attorney for the ninth circuit, Byron L. Herring, as prosecuting attorney for the tenth circuit, William D. Jones, as prosecuting attorney for the eleventh circuit, Andrew A. McDonald, as prosecuting attorney for the twelfth circuit, Hampton S. Powell, as prosecuting attorney for the thirteenth circuit, Gardner Fraser, as prosecuting attorney for the fourteenth circuit, James Cochran, as prosecuting attorney for the fifteenth circuit, Thomas I. Herrn, as prosecuting attorney for the sixteenth circuit and Frederick E. Brown, as prosecuting attorney for the seventeenth circuit, commanding each of them by a certain date, and under a certain penalty, to be an- appear before your Honors in this
14 Honorable Court, then and there to answer all and singular the premises, and to stand, abide and perform such order and decree therein as to your Honors shall be agreeable to equity and good conscience.

This bill of complaint is filed under the corporate authority and corporate seal of the complainant.

(Signed) THE WESTERN UNION TELEGRAPH COMPANY,
By JOHN B. VAN EVERY,
Vice-President.

GEORGE H. FEARONS,
HENRY D. ESTABROOK,
RUSH TAGGART,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

John B. Van Every, being duly sworn, says that he is the Vice President of the Western Union Telegraph Company of New York, the complainant named in the foregoing bill of complaint and who has subscribed to the same; and that the same is true to his own knowledge, except as to the matters therein stated to be alleged

on information and belief, and that as to those matters, he believes to be true.

(Signed) JOHN B. VAN EVERY.

Sworn to before me this 25th day of May, 1907.

(Signed) C. W. CONKLIN.

[SEAL.] *Notary Public, Kings County.*

Cf. filed in N. Y. Co.

EXHIBIT "A."

Arkansas Legislature.

Senate Bill No. 373. Wingo.

Senate Bill No. 373 as Amended in the House.

bill for an act to be entitled "An act to permit foreign corporations to do business in Arkansas, and fixing fees to be paid by all corporations."

Be it enacted by the General Assembly of the State of Arkansas:

SECTION 1. Every company or corporation incorporated under he laws of any other State, territory or country, including foreign ailroad and foreign fire and life insurance companies, now or here- fter doing business in this State, shall file in the office of the Secre- ary of State of this State a copy of its charter or articles of incorpo- ation or association, or a copy of its certificate of incorporation, duly uthenticated and certified by the proper authority, together with a tatement of its assets and liabilities, and the amount of its capital mployed in this State, and shall also designate its general office or lace of business in this State, and shall name an agent upon whom rocess may be served.

Provided, before authority is granted to any foreign corporation o do business in this State, it must file with the Secretary of State a esolution adopted by its Board of Directors, consenting that service f process upon any agent of said company in this State, or upon he Secretary of State of this State in any action brought or pending n this State, shall be valid service upon said company; and if process s served upon the Secretary of State it shall be his duty to at once end it by mail, addressed to the company at its principal office; and f any company shall, without consent of the other party to any suit r proceeding brought by or against it in any court of this State, re- nove said suit or proceeding to any federal court it shall be the duty f the Secretary of State to forthwith revoke all authority of said ompany and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published

in this State; and if any such corporation shall thereafter
16 continue to do business in this State it shall be subject to the penalty of this act for each day it shall continue to do business in this State after such revocation.

SECTION 2. Any foreign corporation which shall fail to comply with the provisions of this act, and shall do any business in this State, shall be subject to a fine of not less than $1,000.00 to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State for the use and benefit of the county in which the suit is brought, and such prosecuting attorney shall receive, as his compensation, one-fourth of the amount recovered; and, as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make any contract in this State which can be enforced by it either in law or equity, and the complying with the provisions of this act after suit is instituted shall in no way validate said contract.

SECTION 3. That all corporations hereafter incorporated in this State, and all foreign corporations seeking to do business in this State, shall pay into the treasury of this State for the filing of said articles a fee of $25.00 where the capital stock is $50,000.00 or under; $75.00 where the capital stock is over $50,000.00, and not more than $100,000.00, and $25.00 additional for each $100,000.00 of capital stock. Any foreign mutual corporation having no capital stock shall be required to pay to the Secretary of State for filing its articles of incorporation the sum of $500.00; provided, how-
17 ever, nothing in this section shall apply to fraternal orders that write insurance.

SECTION 4. That Act No. 185, approved April 17th, 1907, and entitled, "An Act to Provide a Manner in Which Foreign Corporations May Become Domestic Corporations, and for Other Purposes," and all laws and parts of laws in conflict herewith be and the same are hereby repealed; and this act shall take effect and be in force from and after its passage.

Amended and passed House May 9th, 1907. Amendments concurred in by Senate May 10th, and made special order for Monday, May 13th.

Endorsed: Filed and writs issued May 28th, 1907. W. P. Feild, Clerk. By W. Presley Feild, D. C.

And on June 13th, 1907, the following proceedings were had, to-wit:

1459.

WESTERN UNION TELEGRAPH COMPANY
vs.
PRINCE R. ANDREWS, &C., ET AL.

Comes the complainant by Rose, Henningway, Cantrell and Loughborough, Esqs., its solicitors, and by leave of Court first had

nd obtained files herein its amendment to bill; and also come the efendants by W. F. Kirby, Attorney General of the State of Arkanas and Lewis Rhoton, Solicitor and by leave of the Court file herein heir motion to dismiss the bill herein and also their demurrer to the ill.

Which Amendment to Bill is as follows:

18 United States Circuit Court for the Western Division of the Eastern District of Arkansas.

WESTERN UNION TELEGRAPH COMPANY
vs.
P. R. ANDREWS ET AL.

Amendment to Bill.

Your orator having first obtained leave to amend its original bill herein makes the following amendment and addition thereto:

It says, that the said Act of the legislature of Arkansas as described in the said bill, not only provides that if any foreign corporation shall do business in the State of Arkansas without complying with the said act it shall be subject to the suits for penalties hereinbefore described, but says that if it fails or refuses to file its articles of incorporation in said State it cannot make any contracts in this State which can be enforced, and that complying with the provisions of the act after suit is instituted shall not validate the contracts. As hereinbefore described, it offered to file its articles of incorporation with the Secretary of State, and all papers and documents required by this act, but the said Secretary of State refused to permit it to file said articles unless it paid at the same time to him and to the State of Arkansas the sum of $25,050.00, the amount calculated on its capital stock as the fee for the filing of said articles, as provided in Section 3 of said act of the legislature; that the money exactions imposed by said act are filing fees for the filing of its articles of incorporation and other papers described in said act, and said act provides that if it fails to file said articles and certificates it cannot make any contracts in this State.

19 Complainant says that its business consists of making of many contracts with various parties each day, and that said contracts are contracts largely to be performed by some party to them other than the complainant, and that if defendants, or either of them, institute suits purporting to act in their official capacity as Prosecuting Attorneys for the State of Arkansas under said unconstitutional act that the various parties with whom complainant has said contracts will conceive that complainant cannot enforce them, and this situation, unless afforded the relief herein prayed for, will not only result in a multiplicity of suits directed by defendants against this complainant, but will directly result in a multiplicity of suits with the various parties with whom complainant has con-

tracts. Complainant says, that for this injury and damage it has no adequate remedy at law, and that the injury will be irreparable.

GEORGE H. FEARONS,
HENRY D. ESTABROOK,
RUSH TAGGART,
ROSE, HEMINGWAY, CANTRELL AND LOUGHBOROUGH,
For Complainant.

Endorsed: Filed June 13th, 1907. W. P. Feild, Clerk.

Which Motion to dismiss the Bill herein is as follows:

United States Circuit Court for the Western Division of the Eastern District of Arkansas.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
P. R. ANDREWS, &C., *et al.*

Motion to Dismiss.

Come the defendants, the several prosecuting attorneys of
20 the State of Arkansas, by William F. Kirby, Attorney General of the State of Arkansas, and appearing for this special purpose and no other, and move the Court to dismiss this cause, it being a suit by citizens of another State against them in their capacity as officers of the State of Arkansas solely, to enjoin and prevent the enforcing of a criminal statute of the State of Arkansas, in effect and in fact a suit against the State of Arkansas, which is prohibited by Article Eleven of the Constitution of the United States.

Wherefore defendants pray that this suit be dismissed, for cost and all other proper relief.

(Signed) W. F. KIRBY,
Attorney General of State of Arkansas.

Endorsed: Filed June 13th, 1907. W. P. Feild, Clerk.

Which Demurrer to the Bill of Complaint is as follows:

United States Circuit Court for the Western Division of the Eastern District of Arkansas.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
P. R. ANDREWS, &C., ET AL.

Come the defendants, the several prosecuting attorneys of the State of Arkansas, by Lewis Rhoton, Prosecuting Attorney for the Sixth Circuit and W. F. Kirby, Attorney General of the State of

Arkansas, for the special purpose and no other, until the question herein raised is decided, of objecting to the jurisdiction of the Court, by protestation, not confessing or acknowledging all or any part of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein set
21 forth and alleged, demur to the said bill and for cause of demurrer show:

First. That it appears by the plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against this defendant.

Second. That it appears from said bill of complaint that this Court has no jurisdiction to hear and determine this action: (A) the same being a suit in equity to enjoin the enforcement of a criminal statute of the State of Arkansas, under which the said plaintiff has ample remedy in another tribunal: (B) that this Court is denied jurisdiction herein and precluded from the hearing of this action, it being in effect a suit against the State of Arkansas by a citizen of another State, by Article Eleven of the Constitution of the United States.

Third. That said bill of complaint of plaintiff is wholly without equity.

Wherefore, and for other causes of demurrer appearing on said bill, these defendants demur thereto, and pray the judgment of this Honorable Court whether they shall be compelled to make further answer or other answer to the said bill, and humbly pray to be dismissed with their reasonable costs in this behalf sustained, and all other proper relief.

(Signed) LEWIS RHOTON,
Prosecuting Attorney Sixth Circuit.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

(Signed) W. F. KIRBY,
Attorney General State of Arkansas.

I, Lewis Rhoton, one of the defendants in the above entitled cause do solemnly swear that this demurrer is not interposed for delay.

22 (Signed) LEWIS RHOTON.

Subscribed and sworn to before me this 13th day of June, 1907.
W. P. FEILD, *Clerk.*

Endorsed: Filed June 13th, 1907. W. P. Feild, Clerk.

And on June 14th, 1907, the following proceedings were had to-wit:

1459.

WESTERN UNION TELEGRAPH COMPANY
vs.
P. R. ANDREWS, &C., ET AL.

On this day the motion for temporary injunction coming on for hearing, come the parties herein by their respective solicitors, and the said motion is submitted upon the bill and demurrer thereto; and the Court not being sufficiently advised in the premises takes the same under advisement; and pending the determination of this matter,

It is ordered, adjudged and decreed that the said defendants be restrained *from* instituting any actions in any Court whatsoever for the purpose of recovering any penalties for any alleged violations of the Act of the General Assembly of the State of Arkansas, entitled, "An Act to Permit Foreign Corporations to Do Business in Arkansas, and Fixing Fees to Be Paid by all Corporations," Approved May 13th, 1907.

And thereupon said defendants by their said solicitors waived service of formal restraining order herein and agreed that the entry of this order may be considered as service upon each of them.

(Signed) JACOB TRIEBER, *Judge.*

And on June 22nd, 1907, the following decree was entered:

23 1459.

WESTERN UNION TELEGRAPH COMPANY
vs.
P. R. ANDREWS, &C., ET AL.

The Court being now sufficiently advised what order to make on the demurrer of the defendants to the bill of complaint herein argued and submitted on a previous day of this term, doth sustain the demurrer to the jurisdiction of the Court.

It is therefore ordered, adjudged and decreed by the Court that the bill of complaint be dismissed for want of jurisdiction; and it is further ordered, adjudged and decreed that the restraining order heretofore entered in this cause be continued for thirty days, and if, in the meantime an appeal shall be taken by the compl*ai*nant to the Supreme Court of the United States, the restraining order will be continued in force until the appeal is heard and determined by the Supreme Court, provided, that in addition to the ordinary appeal bond the complainant shall make and file in this Court a bond in the penal sum of Fifty Thousand Dollars ($50,000.00) payable to the Clerk of this Court and his successors in office for the benefit of whom it may concern, conditioned that in the event the decree dismissing the bill is affirmed it will pay into Court all damages which may, upon a reference to the Master, be found to have been sustained by the State of Arkansas or any person or persons, cor-

oration or corporations whatsoever, by virtue of the restraining rder herein.

(Signed) JACOB TRIEBER, *Judge.*

And on the same day the following opinion of Court was filed in he cause.

24 In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

WESTERN UNION TELEGRAPH COMPANY
vs.
P. R. ANDREWS ET AL.

Rose, Hemingway, Cantrell and Loughborough, Henry D. Estabrook and Rush Taggart for complaint.

William F. Kirby, Attorney General and Lewis Rhoton, Prosecuting Attorney, for Defendants.

TRIEBER, *D. J.:*

The complainant, a corporation existing under the laws of the State of New York, and engaged in the business of conveying messages by telegraph, seeks by this bill to enjoin the defendants, who are the prosecuting attorneys of the seventeen judicial circuit- of the State of Arkansas, from instituting against it any proceedings for penalties for its failure or refusal to comply with the provisions of an Act of the General Assembly of the State entitled, "An Act to Permit Foreign Corporations to do business in Arkansas, and Fixing Fees to Be paid by all Corporations." Approved May 13th 1907. The Act is as follows:

"SECTION 1. Every company or corporation incorporated under the laws of other states, territory or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this state, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities, and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served.

Provided, before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its Board of Directors, consenting that service of process upon any agent of said Company in this State, or upon the Secretary of State in this State in any action brought or pending in this State, shall be valid service upon said company; and if process is served upon the Secretary of State it shall
25 be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, with-

out consent of the other party to any suit or proceedings brought by or against it in any Court of this State, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this State in any federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority of said company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if any such corporation shall thereafter continue to do business in this State it shall be subject to the penalty of this act for each day it shall continue to do business in the State after such revocation.

SECTION 2. Any foreign corporation who shall fail to comply with the provisions of this act, and shall do any business in this State, shall be subject to a fine of not less than $1,000.00 to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duties of the prosecuting attorneys to institute said suits in the name of the State for the use and benefit of the county in which the suit is brought, and such prosecuting attorney, shall receive, as his compensation, one fourth of the amount recovered; and, as an additional penalty, any foreign corporation who shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make any contract in this State which can be enforced by it either in law or equity, and the complying with the provisions of this act after suit is instituted shall in no way validate said contract.

SECTION 3. That all corporations hereinafter incorporated in this State, and all foreign corporations seeking to do business in this State, shall pay into the treasury of this State for the filing of said articles a fee of $25.00 where the capital stock is $50,000.00 or under; $75.00 where the capital stock — over $50,000.00 and not more than $100,000, and $25.00 additional for each $100,000.00 of capital stock. Any foreign mutual corporation having no capital stock shall be required to pay to the Secretary of State for filing its articles of incorporation the sum of $500.00; provided however, nothing in this section shall apply to fraternal orders that write insurance.

SECTION 4. That Act No. 185, approved April 17th, 1897, and entitled "An Act to Provide a Manner in which Foreign Corporations May Become Domestic Corporations, and for Other Purposes," and all laws and parts of laws in conflict herewith, be and the same are hereby repealed."

The bill so far as it is necessary to set it out for the purpose of the demurrer to the jurisdiction charges that the complainant is now, and has been for years, engaged in the telegraph business throughout the United States and within the State of Arkansas, having fully complied with the acts of Congress which are set out in the
26 bill, and also the valid laws of the State of Arkansas. That it has invested over $160,000.00 in buildings and maintaining its lines and offices in this State, and that for certain reasons unnecessary to mention in this statement, this act is unconstitutional

as to complainant. That for this reason it does not deem itself bound to pay the fees attempted to be exacted from it by this act for the purpose of continuing its business in this State, which fees, it is alleged, exceed $25,000.00. That the various prosecuting attorneys of the State in whose districts complainant is carrying on its business, unless restrained by the order of the Court, will, as they have threatened to do, institute numerous actions for the recovery of the penalties prescribed by the Act, which is no less than $1,000.00 for each alleged violation.

Defendants challenge the jurisdiction of this Court upon two grounds. *First*, that an action for the penalties is a criminal prosecution, and for this reason it is not within the jurisdiction of this Court sitting as a Court in Chancery to enjoin actions for their recovery. *Second*, that the action is one against the State which is the real party to be affected thereby, and for that reason within the prohibition of the Eleventh Amendment to the Constitution of the United States.

I.

As the Act merely provides for the recovery of a penalty, it is, under the laws of the State of Arkansas as settled by the decisions of its highest Court, a civil suit and not a criminal prosecution within the meaning of the Constitution and laws of the State of Arkansas.

Railway Co. *vs.* State, 56 Ark. 166; Kansas City & C. R. R. Co. *vs.* State, 63 Ark., 134; St. L. I. M. & S. Ry. Co. *vs.* State, 68 Ark., 561, 60 S. W. 654; C. O. & G. etc. Ry. *vs.* State, 75 Ark. 369.

In those cases the actions were instituted for alleged viola-
27 tions of Sect. 6595 Kirby's Digest, digested in Mansfield's Digest as Section 5478, and in Sandel and Hill's Digest as Section 6196. That act provided for a penalty of $200.00 for the failure of any railroad company to blow its whistle or ring its bell when at least eighty rods from the place where the train crosses a road. Following the construction of the highest Court of the State in the interpretation of its constitution and statutes, the Court holds that this is not an action to restrain criminal prosecutions but an action to enjoin civil suits for the recovery of penalties.

II.

Is this an action against the State within the prohibition of the Eleventh Amendment to the Constitution?

Counsel for both parties have cited numerous cases to sustain their respective contentions. A careful examination of these cases shows that the supposed conflicting views of the Supreme Court of the United States as well as those of the national courts inferior to that tribunal, are not real, and that considering carefully the facts in each case there is little trouble in reconciling these supposed divergent views and arrive at a correct conclusion as to what is now the settled law as declared by the Supreme Court of the United States.

The principle as laid down by Chief Justice Marshall in Osborne *vs.* Bank of the United States, 9 Wheat. 738, 856, that a State is not sued unless it is named as a defendant upon the record, may be said to have been abandoned long ago. To review all the cases determined by the Supreme Court of the United States and the numerous inferior national courts on that subject since Osborne *vs.* Bank of the United States, would serve no useful purpose, as the latter decisions review all these cases and formulate what must now be considered the law on that subject.

28 A leading case on that question is *In re* Ayers, 123 U. S. 443, 487, 502, 503. In that case Mr. Justice Matthews delivering the opinion of the court said:

"It must be held as the settled doctrine of this court established by its recent decisions, 'that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record.' This, it is true, is not in harmony with what was said by Chief Justice Marshall in Osborne *vs.* Bank of the United States. 'The State not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether in the exercise of its jurisdiction the court ought to make a decree against the defendants; whether they are to be considered as having real interests or as being only nominal parties.'

"This conveys the intimation that where the defendants who are sued as officers of the State have not a real but merely a nominal interest in the controversy, the State appearing to be the real defendant, and therefore an indispensable party, if the jurisdiction does not fail for want of power over the parties, it does fail, as to the nominal defendants, for want of a suitable subject matter."

After reviewing numerous authorities, the learned Justice proceeds:

"A bill, the object of which is by injunction, indirectly, to compel the specific performance of the contract, by forbidding all those acts and doings which constitute breaches of the contract, must also, necessarily, be a suit against the State. In such a case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the State. It may be asked what is the true ground for distinction, so far as the protection of the Constitution of the United States is revoked, between the contract rights of the complainant in such a suit, and other rights of persons and of property. In these later cases it is said that jurisdiction may be exercised against individual defendants, notwithstanding the official character of their acts, while in cases of the former description the jurisdiction is denied.

"The distinction, however, is obvious. The acts alleged in the bill as threatened by the defendants, the present petitioners, are violations of the assumed contract between the State of Virginia and the complainants, only as they are considered to be the acts of the State of Virginia. The defendants, as individuals, not being

parties to that contract, are not capable in law of committing a breach of it."

In Fitts *vs.* McGhee, 172 U. S. 516, 528, the Court said:

"To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those against its officers,
29 agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.

"If these principles be applied in the present case there is no escape from the conclusion that, although the State of Alabama was dismissed as a party defendant, this suit against its officers is really one against the State. As a State can act only by its officers, an order restraining those officers from taking any steps, by means of judicial proceedings, in execution of the statute of 1895, is one which restrains the State itself, and the suit is consequently as much against the State as if the State were named as a party defendant on the record."

In reply to the contention of counsel that this suit was not one against the State, Regan *vs.* Farmers' Loan and Trust Co., 154 U. S. 362; Smyth *vs.* Ames, 169 U. S. 466 and other cases similar to those there cited, the Court distinguished those cases from the one before it, saying:

"Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing or about to commit some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals, holding official positions under a State, to prevent them, under the sanction of an unconstitutional statute from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the Courts of the State. In the present case, as we have said, neither of the State Officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of an act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter as Attorney General, might represent the State in litigation involving the enforcement of its statutes."

The result of that decision was that the injunction which had been granted against these officers by the Circuit Court was dissolved and the cause directed to be dismissed for want of jurisdiction.

The distinction is aptly stated in Missouri, etc. Ry. Co. *vs.* Missouri R. R. Com. 183 U. S. 53, 60, where the court said: "It is true that the State has a governmental interest in the welfare of
30 its citizens, in compelling obedience to the legal orders of all its officials, and in securing compliance with all its laws. But such general governmental interest is not that which makes the State, as an organized political community, a party in interest in the litigation, for if that were so the State would be a party in interest in all litigation; because the purpose of all litigation is to preserve and enforce rights and secure compliance with the laws of the State, either statute or common."

In that case the State Board had instituted suit for the purpose of enforcing certain orders regulating fares over a bridge. It was sought by the defendant to remove the cause to the United States Court, and the Court held that a Federal question being involved, it could be done. In the case at bar, the payment of the franchise tax is solely for the benefit of the State, and the penalties are only intended to enforce compliance with the law. Payment into the State treasury of the fees prescribed prevents all actions for penalties.

In Cotting *vs.* Kansas City Stock Yards Co., 183 U. S. 79, the Attorney General of the State of Kansas had been joined with the corporation in a suit which was instituted by a stockholder for the purpose of preventing him from instituting proceedings for penalties for failure on the part of the Stock Yards Co. to comply with the laws of the State of Kansas regulating charges. The defense that a suit against the Attorney General was in fact a suit against the State was not raised in the court below, but for the first time in the Supreme Court. The court disposed of the question in view of the fact that the question had not been raised in the court below, as follows:

"Without expressing any opinion as to the jurisdiction of the Court if it had been properly and seasonably challenged we think the true solution of this matter will be found in declaring a dismissal of the suit as to the Attorney General without prejudice to any other suit or action."

In Belknap *vs.* Schild, 161 U. S. 10, 18, 24 a bill had been filed against Belknap, a Commodore of the United States Navy,
31 in charge of a navy yard of the United States for an infringement of letters *of* patent granted by the United States to the plaintiff for an improvement in caisson gates and also to enjoin him from using it in the navy yard. In holding that this was a suit against the United States and for that reason could not be maintained, the court said:

"But the exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States. Such

officers or agents, although acting under order of the United States, are therefore personally liable to be sued for their own infringement of a patent.

"The extent to which officers or agents of the government may be restrained by injunction from doing unlawful acts to the prejudice of private rights is illustrated by the decisions of this court regarding injunctions from the Courts of the United States to officers and agents of a State, which by the Constitution of the United States, is as exempt as the United States are from private suits.

"In a suit in which the State is neither formally or really a party, its officers, although acting by its orders and for its benefit, may be restrained by injunction, when the remedy at law is inadequate, from doing positive acts, for which they are personally and individually liable, taking or injuring the plaintiff's property, contrary to a plain official duty requiring no exercise of discretion, and in violation of the Constitution or laws of the United States.

"But no injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its treasury when the suit is commenced; or to compel the State to perform its obligations; or where the State has otherwise such an interest in the object of the suit as to be a necessary party."

After reviewing numerous authorities the court announced its conclusion in the following language:

"In the present case the caisson gate was a part of the dry dock in a navy yard of the United States, was constructed and put in place by the United States, and was the property of the United States, and held and used by the United States for the public benefit. If the gate was made in infringement of the plaintiff's patent, that did not prevent the title in the gate from vesting in the United States. The United States, then, had both the title and the possession of the property. The United States could not hold or use it, except through officers and agents. Although this suit is not brought against the United States by name, but against their officers and agents only, nevertheless, so far as the bill prayed for an injunction, and for the destruction of the gate in question, the defendants had no individual interest in the controversy; the entire interest adverse to the plaintiff was the interest of the United States in property of which the United States had both title and the possession.—And the suit therefore, could not be maintain-d without violating the principles affirmed in the long series of decisions of this court
32 above cited."

The same conclusion was reached in Int. Postal Supply Co. *vs.* Bruce, 194 U. S. 601.

In Minnesota *vs.* Hitchcock, 185 U. S. 373, 386, the State of Minnesota sought to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from selling certain lands, claiming that they had been granted to that State by previous acts of Congress. One of the questions was whether this was not an action against the United States, and it was held that it was, although

not a party to the suit which was brought against the Secretary of the Interior, the court holding:

"That the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which in fact it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

See also Oregon *vs.* Hitchcock 102 U. S. 60, and Nagaanab *vs.* Hitchcock, 202 U. S. 173.

In Chandler *vs.* Dix, 194 U. S. 590, it was sought by an action against the Auditor General of the State of Michigan to cancel as a cloud on the title of real estate claimed by the plaintiff, certain sales of land made to the State of Michigan for non-payment of taxes under laws alleged to be unconstitutional and void. The statutes of Michigan provided that in actions of that kind: "the Auditor General shall be made a party defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as state tax lands, or
33 which have been sold as such, or which have been sold at annual tax sales, or for the purpose of setting aside any taxes returned to him and for which sale has not been made;" and it was held that the State of Michigan in enacting this legislation had in mind only proceedings of that nature in the courts of the State, and for this reason it was not a waiver of the immunity granted to the State from being sued in the National courts by the Eleventh Amendment to the Constitution.

A similar conclusion was reached by the court in Smith *vs.* Reeves, 178 U. S. 436, 446, arising under the statute of the State of California.

In Arbuckle *vs.* Blackburn, 113 Fed. 616, 51 C. C. A. 122, it was sought to enjoin the Dairy and Food Commissioner of Ohio from prosecuting the vendors of a certain article of food, because of an alleged violation of the Pure Food Laws of that State. The injunction was denied. Judge Day, now Mr. Justice Day of the Supreme Court, in delivering the opinion of the court said, after quoting from Harkrader *vs.* Wadley 172 U. S. 148:

"Upon the authority of this case and others decided in the Supreme Court, it seems clear that this action cannot be maintained consistently with the Eleventh Amendment to the Constitution, withholding the judicial power of the United States from suits in

law or equity commenced or prosecuted against one of the United States by citizens of another State, or citizens or subjects of any foreign State.—The injunction sought is against the prosecution of suits in the Ohio courts which are about to be instituted by Blackburn, not in his individual capacity, but as an officer of the State. By the terms of the Statute the dairy and food commissioner is an officer of the State expressly charged with the enforcement of all laws against frauds and adulterations or impurities in foods, drink, or drugs and unlawful labeling in the State of Ohio. It is made his duty by statute to prosecute, or cause to be prosecuted, any person or persons, firm or firms, corporation or corporations, engaged in the manufacture or sale of any adulterated article or articles of food or drink or adulterated in violation of or contrary to any laws of the State of Ohio.—What, then, is the object of the injunction sought in this case? It is no more or less than to restrain the officer of the State from bringing prosecutions for violations of an act which such officer is expressly charged to enforce in the only way he is authorized to proceed—by bringing criminal prosecutions in the name of the State. This is virtually to enjoin the State from
34 proceeding through its duly qualified and acting officers."

In Farmers' National Bank *vs.* Jones, 105 Fed. 459, it was sought to compel the State Debt Board of Arkansas to issue funding bonds for other bonds. Judge Caldwell in delivering the opinion of the Court in refusing the injunction said:

"The state debt board owes to the state the duty to do for and in the name of the state the things enjoined upon it by the act of the legislature and none other. The board as a board has no contract relations with the owners of lost or destroyed bonds, and stands in no relation to them which imposes on the board any duty towards them whatever; and if it be conceded that the state owes to the owners of lost or destroyed bonds, no matter by whose agency lost or destroyed, the duty of issuing new bonds in their stead, no federal court can coerce the state, or any of its officers or boards, by any form of suit or proceedings, to the performance of that duty."

See also Morenci Copper Co. *vs.* Freer (C. C.) 127 Fed. 199, Union Trust Co. *vs.* Stearns, 119 Fed. 790.

Counsel for complainant laid great stress on what was decided in Western Union Telg. Co. *vs.* Myatt, 98 Fed. 335, and Haverhill Gas Co. *vs.* Barker 109 Fed. 694.

In Western Union Telegraph Company *vs.* Myatt the facts were: The State of Kansas, by statute, had created a court called "The Court of Visitation," with powers and jurisdiction to try and determine all questions as to what were reasonable freight rates and other charges connected with the transportation of freight between points in the State; "the court" to possess full common law and equity powers of the matters within its jurisdiction; the pleadings to be styled "an information;" and it was made the duty of the State Solicitor to file informations in the name of the State upon receiving sworn information of any violation of the act. If the State Solicitor neglected his duties that "court" was authorized to appoint

a Special Solicitor. That Court was authorized, after a hearing, to render a decree and specially find the facts it deemed most material, the value of the road and all property used in connection
35 therewith; the actual cost thereof, the amount of the capital stock, the bonded and other indebtedness, what part is fictitious and fraudulent, if any, and many other facts specified which are deemed necessary for the information of the appellate court, if the decree of the court is appealed from. The Supreme Court was given appellate jurisdiction from the orders and decrees of that "Court of Visitation." The decree is to embody a complete schedule of the charges adjudged to be reasonable and the classification of freight necessary for the expression thereof. Any officer, agent or employé of the company, and the company itself, was to be subject to a fine of $1,000.00 for every day for failure to comply with the terms of the decree of that "court." And the "court" was directed to appoint a receiver to sequester the property of the company if it failed to comply with its orders or decree for thirty days. It is made the duty of the State Solicitor to prosecute such offenses criminally and to recover the penalties by civil action. It also provides for the recovery of damages by parties injured by disobedience to the decree of the "court." This jurisdiction and powers is also extended over telegraph companies. The bill charged that the rates fixed by that "court" for telegraphic messages was materially less than the cost of performance; that over six hundred suits had been instituted against it for its refusal to transmit messages at the rates fixed, and that one Maxwell had filed complaint with the State Solicitor, the defendant Myatt, and the latter had filed an information against the complainant, the Western Union Telegraph Company in the "Court of Visitation." The bill for injunction made the State Solicitor Myatt, the informant Maxwell and the members of the "Court of Visitation" defendants, and asked that the act be declared unconstitutional as to it because the enforcement of the rates
36 fixed would tend to deprive the complainant of its property without due process of law, and in violation of the Fourteenth Amendment to the Constitution.

It was conceded that the proof showed that the rates fixed were not only not compensatory, but materially less than the actual cost of service. These allegations and proofs, Judge Hook held, brought the case strictly within the rules established in the actions against State Railroad Commission and was not within the rules laid down in Fitts *vs.* McGhee, for there was authority to sequester the property of the corporation, which if the act is void, would constitute a trespass. The opinion is very exhaustive and able, but a careful perusal thereof shows that it can have no application to the case at bar as shown by the allegations in the bill.

In Haverhill Gas Light Co. *vs.* Barker, the action was against the Massachusetts Gas Commission and the Attorney General of that State. The act creating the commission authorized it, under certain circumstances, to fix the price of gas, and made it the duty of the Attorney General to enforce the orders made by the commission. It was alleged that the price fixed for the gas furnished by complain-

ant was so low as not to cover the reasonable cost of manufacture, and for this reason the order was alleged to be in violation of the Fourteenth Amendment to the National Constitution. It was further charged that the commission and the Attorney General were about to enforce the orders fixing the price of gas at that confiscatory rate by instituting proceedings against complainant in the Courts of the State, and such actions would prevent the company from collecting from its customers the amounts due it without litigation and thus cause a multiplicity of suits.

The court very properly held that this was not an action against the State, but a proceeding of the same nature as that against
37 the State Railroad Commission for fixing transportation rates so low as to virtually amount to confiscation. The court in its opinion was governed by what was said by Justice Miller in Chicago, etc. Ry. Co. *vs.* Minnesota, 134 U. S. 418; 10 Sup. Ct. 462; 33 L. Ed. 970; and Justice Shiras in Ry. Co. *vs.* Gill 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, "that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected."

No question of that kind is involved in this case, the only question being, shall the law officers of the State be enjoined from suing complainant for penalties alleged to have been incurred by reason of failure to comply with its laws requiring a foreign corporation to file a copy of its charter and pay certain fees, upon the ground that the act is unconstitutional so far as the rights of complainant are affected thereby?

It is also claimed that Fitts *vs.* McGhee is distinguishable from the case at bar owing to the fact that in that case, as stated by Mr. Justice Harlan, who delivered the opinion of the court, neither the Attorney General nor the Solicitor of the Judicial Circuit was charged with any *special* duty in connection with the statute sought to be annulled, 172 U. S. 529, while in the act now under consideration it is "made the special duty of the prosecuting attorneys (the defendants) to institute suits in the name of the State," for the recovery of the penalty and it is further provided that such prosecuting attorney "shall receive as his compensation one-fourth of the amount recovered."

It has been the settled law of the State of Arkansas ever since its admission as a State that "all actions in favor of, and in which the State is interested, shall be brought in the name of the
38 State in the Circuit Court of the County in which the defendant may reside or be found, and shall be prosecuted by the prosecuting attorney for the State prosecuting in such circuit." Sec. 779 Kirby's Digest. And that for his services he shall receive fees dependent in criminal cases upon conviction and in civil actions upon recovery and collection. Sec. 3488 Kirby's Digest.

For some reason the General Assembly of the State has seen proper in many instances to provide specially that it shall be the duty of prosecuting attorneys to prosecute offenses and institute and defend certain suits, and also provide specially for his compen-

sation in some of these instances. Without enumerating all these special provisions the following may be referred to as digested in Kirby's Digest of the Statutes:

SEC. 592: To institute proceedings for violation of the civil rights act. Sec. 618: To prosecute clerks of courts when charged with a misdemeanor in office. Sec. 1748: to enforce the gaming laws. Sec. 1954: For violation of the obscene literature statute. Sec. 4100: To prosecute civil suits instituted by County Timber Inspectors for trespasses on the public domain. Sec. 5143: To prosecute violations of the liquor laws, and Sec. 5147 fixing his fees for such conviction the same as for felonies, although the offense is only a misdemeanor. Sec. 5272: To prosecute violations of the dentistry act. Sec. 5286: To prosecute violations of the pharmacy act. Sec. 7189: To institute suits against collecting officers and their sureties.

For these reasons the provision of the act now in question must be treated merely as declaratory of the general laws of the State making it the duty of the prosecuting attorneys to prosecute all actions in which the State is interested, and not as a special
39 duty within the meaning of what was said in Fitts *vs.* McGhee. The "special" duty there meant is an administrative duty, such as is exercised by boards or ministerial officers, but not attorneys. Supposing the act had provided, that suits for the recovery of these penalties should be instituted and prosecuted by Special Counsel employed by the Governor, and whose compensation should be one-fourth of the amount recovered, could a National court under the decision of Fitts *vs.* McGhee enjoin the attorney thus employed by the Governor from proceeding under his employment without making the State a party?

A careful examination of the many authorities on this subject leads to the following conclusions as to when an action is against the State or not such a suit, within the meaning of the Eleventh Amendment to the National Constitution:

(*a*) No suit can be maintained in the Courts of the United States against the officers of a State when the State, though not named in the pleadings, is the real party against which the relief is asked and the judgment will operate.

(*b*) If an individual, although he be an officer and claims under a statute of the State, which statute, is unconstitutional, holds possession or is about to take possession of, or to commit any trespass upon property belonging to or in possession of the plaintiff, he cannot resist the judicial determination in a suit against him of the question of the right of such possession or threatened trespass by simply asserting that he held and was entitled to hold or seize the property in his capacity as an officer of the State, and for this reason the suit is one against the State.

(*c*) The exemption of the State from judicial process does not protect its officers and agents from being personally liable to an action of tort by a private person whose rights or property they have wrongfully invaded or injured even by authority of the
40 State, and when the remedy at law is inadequate its officers may be restrained by injunction from doing positive acts

for which they would be personally liable for taking or injuring plaintiff's property in violation of the Constitution or laws of the United States.

(*d*) It may be safely held that the State is the real party when the relief sought is that which enures to it alone; or when the action will have the effect of depriving the State of funds or property in its possession.

(*e*) That fact that the State has a governmental interest in the welfare of its citizens in compelling obedience to the legal orders of its officials for the benefit of the public at large, is not that which makes the State as the organized political community a party in interest to the litigation. The interest must be one in the State as an artificial person as distinguished from that of a government for the benefit of the citizens.

(*f*) The fact that the State voluntarily assumes the defense in the cause or litigation does not make it the real party. This is simply an incidental matter and does not determine its relation to the suit.

(*g*) That an action to prevent the enforcement of a tariff which is unreasonable and confiscatory and which is to be enforced by a commission or other officials who are merely acting as administrative agents for the State is not one against the State, if the act itself is unconstitutional and void as against the complainant.

(*h*) A proceeding against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which the officers will act only by formal judicial proceedings in the courts of the State, as attorney for the State is in effect a suit against the State.

The allegations in the bill show that this is an attempt to
41 prevent the State of Arkansas through its officers, who by its laws are merely its attorneys to represent it in all legal actions in its favor or in which it is interested, from instituting and prosecuting suits for the recovery of penalties incurred for alleged violation of its laws, actions which can only be instituted in the name of the State and for its use and benefit.

That fact that the State, by its legislature, has seen proper for reasons which cannot be questioned by the courts, to donate the penalties when recovered to the counties in which they have accrued or are recovered, cannot change the conclusion that the suit is one against the State, for no one has a right to question what a State shall do with the monies by it collected, especially when it sees proper to donate it to the counties which are merely subdivisions and agencies of the State. Coffey *vs.* Harlan County, 204 U. S. 659. But even if it be conceded that this part of the act is unconstitutional, it would not affect the remaining provisions. Railway Co. *vs.* State, 56 Ark. 166.

Nor is it material that a certain portion of these fees are to be paid to its attorneys for their services.

For these reasons it is impossible to reach any other conclusion than that this action is in fact a suit against the State and within the inhibition of the Eleventh Amendment to the Constitution of the

United States. To hold that a court may assume jurisdiction of an action against the attorneys of a party and enjoin them from instituting suits for their client, when it is expressly prohibited from exercising such jurisdiction against the client would, to say the least, be novel. In fact, how can a court of equity proceed against an attorney and affect the rights of his client without having the client before it as a party to the suit? Hapgood *vs.* Southern, 117 U. S. 52, 71, Chandler *vs.* Dix, *supra* Belknap vs. Schild, *supra,*

42 Cunningham *vs.* Macon &c. R. R., *supra.*

In view of the great importance of the question involved in this case and the desire expressed by complainant to appeal it to the Supreme Court of the United States, and as irreparable injury might result to it if that court should hold that the dismissal of the bill by this court was erroneous, while on the other hand a continuance of the restraining order pending such appeal can do but little harm to the State, against which it can be protected by a sufficient bond, it is proper for the trial court to maintain if possible the *status quo* pending an appeal. This course was adopted by Judge Thayer in Cotting *vs.* Kansas City Stock Yards Co. 82 Fed. 850, 857, and approved by the Supreme Court on appeal of that case, 183 U. S. 79, 83.

For these reasons, although the bill will be dismissed, the restraining order heretofore granted, will be continued for thirty days, and in the mean time if an appeal shall be taken the restraining order will be continued in force until the appeal is heard and determined by the Supreme Court; provided, that in addition to the ordinary appeal bond the complainant shall make and file in this Court a bond in the penal sum of $50,000.00 payable to the Clerk of this Court or his successor in office for the benefit of whom it may concern, conditioned that in the event of the decree dismissing the bill is affirmed it will pay into Court all damages which may upon a reference to a Master be found to have been sustained by the State of Arkansas or any person or persons whomsoever.

Endorsed: Filed June 22nd, 1907. W. P. Feild, Clerk.

43 And on June 24th, 1907, the following proceedings were had, to-wit:

1459.

WESTERN UNION TELEGRAPH COMPANY
vs.
P. R. ANDREWS, &c., ET AL.

On this day the following certificate of the Honorable Jacob Trieber, United States District Judge for this District was filed in the above entitled cause:

"I, Jacob Trieber, United States District Judge for the Eastern District of Arkansas, do hereby certify that I was the sole presiding Judge at the hearing of the above entitled cause, and that the said

action was dismissed by the Court solely upon the ground that the action is in effect a suit against the State of Arkansas, and for this reason is prohibited by the Eleventh Amendment to the Constitution of the United States, and therefore this Court — without jurisdiction to entertain the same.

Witness my hand as such Judge this 24th day of June, 1907.

(Signed) JACOB TRIEBER, *Judge.*"

And on July 6th, 1907, the following proceedings were had, to-wit:

1459.

WESTERN UNION TELEGRAPH COMPANY
vs.
P. R. ANDREWS, &c., ET AL.

Comes the complainant by H. D. Estabrook, Rush Taggart and Rose, Hemingway, Cantrell and Loughborough, Esqs., its solicitors, and files herein its assignment of errors and prayer for appeal of this cause from the decree rendered herein to the Supreme Court of the United States, which prayer for appeal is granted upon complainant filing a bond in the sum of Five Hundred Dollars
44 ($500.00), conditioned as required by law, and a further bond in the sum of Fifty Thousand Dollars ($50,000.00) payable to the Clerk of this Court or his successors in office for the benefit of whom it may concern conditioned that in the event the decree dismissing the bill is affirmed it will pay into Court all damages, which may upon a reference to a Master, be found to have been sustained by the State of Arkansas, or any other person or persons whomsoever. Thereupon comes said complainant by its said solicitors and files herein its appeal bond in the sum of Five Hundred Dollars ($500.00) with E. C. Newton as surety and also its further bond in the sum of Fifty Thousand Dollars ($50,000.00) with the American Surety Company of New York as surety, both of which bonds are approved by the Judge of this Court and considered as sufficient for the purposes given. And said complainant also files herein its citation with service of the same accepted by W. F. Kirby, Attorney General of the State of Arkansas, and solicitor for the appellees.

Which Assignment of Errors is as follows:

In the United States Circuit Court for the Western Division of the Eastern District of Arkansas.

WESTERN UNION TELEGRAPH COMPANY
vs.
PRINCE R. ANDREWS, &c., ET AL.

Comes the complainant by Henry D. Estabrook, Rush Taggart and Rose, Hemingway, Cantrell and Loughborough, its solicitors and prays an appeal to the Supreme Court of the United States from

the final decree rendered in this cause during the present term of this Court and presents the following assignment of errors:

First. The Court erred in decreeing that the bill of com-
45 plaint herein be dismissed for want of jurisdiction.

For which error the Western Union Telegraph Company prays that the decree of the United States Circuit Court for the Western Division of the Eastern District of Arkansas, dated this June 22nd, 1907, be reversed and judgment rendered for appellant and for costs.

(Signed) H. D. ESTABROOK.
RUSH TAGGART.
ROSE, HEMINGWAY, CANTRELL, AND LOUGHBOROUGH, *Solicitors.*

Appeal granted, returnable within thirty days and upon execution of a bond in the penal sum of Five Hundred Dollars ($500.00) conditioned as required by law, and the appeal to act as a supersedeas until the appeal is heard and determined by the Supreme Court, provided that in addition to the appeal bond aforementioned, the complainant shall make and file in this Court a bond in the penal sum of Fifty Thousand Dollars ($50,000.00) payable to the Clerk of this Court or his successors in office for the benefit of whom it may concern, conditioned that in the event the decree dismissing the bill is affirmed, it will pay into Court all damages, which may upon a reference to a Master be found to have been sustained by the State of Arkansas, or any person or persons whatsoever.

(Signed) JACOB TRIEBER, *Judge.*

Endorsed: Filed July 6th, 1907. W. P. Feild, Clerk.

Which Appeal Bond is in words and figures following to-wit:

46 In the United States Circuit Court for the Western Division of the Eastern District of Arkansas.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
PRINCE R. ANDREWS, &C., ET AL.

Known all men by these presents, that we, the above named plaintiff, The Western Union Telegraph Company, as principal and E. C. Newton, as surety, are held and firmly bound unto the above named defendants in the sum of Five Hundred Dollars, to be paid to them, for the payment of which well and truly to be made we bind ourselves and each of us, jointly and severally, firmly by these presents.

Whereas, the above named plaintiff has prosecuted an appeal to the Supreme Court of the United States to reverse the decree in the above entitled cause by the said Court,

Now, therefore, the condition of the above obligation is such that if the above bound principal shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good,

then this obligation shall be void, else to remain in full force and virtue.

Witness our hands this 29th day of June, 1907.

[SEAL.] WESTERN UNION TELEGRAPH COMPANY,
R. C. CLOWRY, *President.*
E. C. NEWTON.

Attest:
A. R. BREWER, *Secretary.*

STATE OF NEW YORK, *County of New York, ss:*

On this 27th day of June, A. D. 1907, before me personally appeared Robert C. Clowry, President of the Western Union Telegraph Company, to me known, who, being by me duly sworn, did depose and say that he resides in the City, County and State of New York; that he knows the corporate seal of the Western Union Tele-
47 graph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company and was so affixed by order of the executive committee of the Board of Directors, and that by like order he signed the same as President. And on the same day and year before me personally appeared Abijah R. Brewer, Secretary of the said Company, to me known, who, being duly sworn, did depose and say that he resides in the Borough of Glen Ridge, County of Essex and State of New Jersey; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said Company, and was so affixed by order of the executive committee of the Board of Directors, and that by like order he attested the same as Secretary.

(Signed) CHARLOTTE A. VAN BRUNT,
[SEAL.] *Notary Public, Kings County.*

Certificate filed in New York County.

Approved:
JACOB TRIEBER, *Judge.*

Endorsed: Filed July 6th, 1907. W. P. Feild, Clerk.

Which Supersedeas Bond is in words and figures following, to-wit:

In the United States Circuit Court for the Western Division of the Eastern District of Arkansas.

WESTERN UNION TELEGRAPH COMPANY
vs.
PRINCE R. ANDREWS, &C., ET AL.

We, the Western Union Telegraph Company, as principal, and American Surety Company of New York, as surety, are held
48 and firmly bound unto W. P. Feild, Clerk of this Court, and to his successors in office for the benefit of whom it may concern, in the sum of Fifty Thousand Dollars. The conditions of the above obligation are such that,

Whereas, the above named plaintiff has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled cause by said Court.

Now, therefore, if said decree dismissing said bill is affirmed, then this bond shall be in full force and there shall be paid hereon into said Court all damages which may, upon a reference to a Master of this Court, be found to have been sustained by the State of Arkansas or any person or persons, corporation or corporations whatsoever, by virtue of the restraining order issued in this cause, restraining the defendants and each of them from prosecuting any action against this plaintiff by virtue of the Act of the General Assembly of the State of Arkansas entitled, "An Act to permit foreign corporations to do business in this State, and fixing fees to — paid by all corporations," approved May 13th, 1907, and provided that if upon said appeal the decree of this Court is reversed, then this obligation shall be void.

Witness our hands this 2nd day of July, 1907.

[SEAL.] WESTERN UNION TELEGRAPH COMPANY,
R. C. CLOWRY, *President.*

Attest:
A. R. BREWER, *Secretary.*

AMERICAN SURETY COMPANY OF NEW YORK,
By J. M. MOORE, *Resident Vice Prest.*

Attest:
H. P. EDMONSON,
Resident Asst. Sec'y.

STATE OF NEW YORK, *County of New York, ss:*

On this 27th day of June, A. D. 1907, before me personally appeared Robert C. Clowry, President of the Western Union
49 Telegraph Company, to me known, who, being by me duly sworn, did depose and say that he resides in the City, County and State of New York; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company and was so affixed by order of the executive committee of its Board of Directors, and that by like order he signed the same as President. And on the same day and year before me personally appeared Abijah R. Brewer, Secretary of the said Company, to me known, who, being duly sworn, did depose and say that he resides in the Borough of Glen Ridge, County of Essex and State of New Jersey; that he knows the corporate seal of the Western Union Telegraph Company; that the seal affixed to the foregoing instrument is the corporate seal of said company and was so affixed by order of the executive committee of its Board of Directors, and that by like order he attested the same.

(Signed) CHARLOTTE A. VAN BRUNT,
Notary Public, Kings County.

[SEAL.]

Certificate filed in New York County.

Extract from the Record Book of the Executive Committee of the American Surety Company of New York.

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 20th day of February, 1907, the following resolutions were adopted:

Resolved, That John M. Moore and W. B. Smith of Little Rock, Arkansas, be and they hereby are and each of them is hereby constituted and appointed a Resident Vice President of this Company at the town or city, aforesaid, with full power and authority to execute and deliver any and all surety bonds and undertakings, for or on behalf of this Company in its business and in accord-
50 ance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of a Resident Assistant Secretary of this Company.

Resolved, That H. P. Edmonson and J. F. Lenon, of Little Rock, Arkansas, be and they hereby are and each of them is hereby constituted and appointed a Resident Assistant Secretary of this Company at the town or city aforesaid, with full power and authority to attest any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds to have in every instance however, the seal of this Company affixed thereto, and to be executed on behalf of this Company by one of its Resident Vice Presidents."

STATE OF NEW YORK, *County of New York, ss:*

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the record book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said record book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the minute book of said Company, and do certify that the same are correct and true transcripts therefrom, and of the whole of said original resolutions, and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company at the
51 City of New York, this 20th day of March, 1907.

(Signed) F. J. PARRY,
[SEAL.] *Assistant Secretary.*

Endorsed: Filed July 6th, 1907. W. P. Feild, Clerk.

Which Citation is as follows:

52 THE UNITED STATES OF AMERICA:

To P. R. Andrews, Clyde Going, R. E. Jeffrey, D. B. Horsley, H. M. Jacoway, Lewis Rhoton, H. B. Means, O. A. Graves, J. S. Lake, B. L. Herring, W. D. Jones, A. A. McDonald, H. S. Powell, Gardner Fraser, James Cochran, Thomas I. Herrn, & F. E. Brown, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court, at the City of Washington, within thirty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, wherein the Western Union Telegraph Company is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Jacob Trieber, Judge of the Circuit Court of the United States for the Eastern District of Arkansas, this 6th day of July, in the year of our Lord one thousand nine hundred and seven.

JACOB TRIEBER,
United States District Judge for the Eastern District of Arkansas.

Service accepted.

W. F. KIRBY,
Atty General for the State of Arkansas and Solicitor for the Appellees.

Endorsed: Filed July 6, 1907. W. P. Feild, Clerk.

53 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

I, W. P. Feild, Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the originals remaining of record in my office, and constitute a true copy of the record, the assignment of errors and of all proceedings in case of Western Union Telegraph Co. *v.* Prince R. Andrews &c., *et als.*

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 19th day of July, in the year of our Lord, One

Thousand Nine Hundred and Seven and of the Independence of the United States of America, the One Hundred and thirty-second.

[The Seal of the Circuit Court, U. S. A., Western Division, of East. Dist. of Ark.]

W. P. FEILD, *Clerk*.

Attest:

———, ———.

Endorsed on cover: File No. 20,811. E. Arkansas C. C. U. S. Term No. 408. The Western Union Telegraph Company, appellant, *vs.* P. R. Andrews, Clyde Going, R. E. Jeffrey *et al.* Filed July 23d, 1907. File No. 20,811.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 45

OSWALD C. LUDWIG, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

FILED DECEMBER 30, 1907.

(20,951.)

(20,951.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 233.

OSWALD C. LUDWIG, AS SECRETARY OF STATE OF THE STATE OF ARKANSAS, APPELLANT,

vs.

THE WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 27, 1908.

1 Be it remembered, that on the thirty-first day of May, 1907, came into the office of the Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, Western Union Telegraph Company, by George H. Fearons, Henry D. Estabrook, Rush Taggert, Rose, Hemingway, Cantrell and Loughborough, Esqs., its solicitors, and filed therein on the Chancery side of said Court its bill for injunction against Oswald C. Ludwig, Secretary of State of the State of Arkansas, which bill for injunction is as follows, to-wit:

In the United States Circuit Court, Western Division of the Eastern District of Arkansas. In Chancery.

WESTERN UNION TELEGRAPH COMPANY

vs.

OSWALD C. LUDWIG, Secretary of State of the State of Arkansas.

To the Honorable Judges of the Circuit Court of the United States for the Eastern District of Arkansas:

The Western Union Telegraph Company, a corporation duly organized under the laws of the State of New York, and a citizen and resident of said State, and having its principal place of business in the State of New York and the Southern District thereof, brings this its bill of complaint against the defendant, Oswald C. Ludwig, Secretary of State of the State of Arkansas, a citizen and resident of said State of Arkansas, and a resident of the Western Division of the Eastern District thereof, and says that the defendant, Oswald C. Ludwig, was duly elected Secretary of State of the State of Arkansas, and is now acting as such.

That this case is wholly between citizens of different states, and that the subject matter thereof and the amount in con-
2 troversy is of the value of more than Two Thousand Dollars ($2,000.00) exclusive of interest and costs, and is also one arising under the Constitution and Laws of the United States, in that your orator, The Western Union Telegraph Company asserts rights and privileges under Acts of Congress and the Constitution and Laws of the United States against the defendant.

Second. That your orator, the Western Union Telegraph Company, is a telegraph company, and a corporation duly organized and existing under an Act of the Legislature of the State of New York, entitled, "An Act to provide for the incorporating and regulating of telegraph companies," passed on the 12th day of April 1848.

Third. Your orator further says, that the Congress of the United States passed an Act approved July 24th, 1866, entitled, "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes." That by a further Act of Congress, approved June 10th, 1872, entitled "An Act making appropriation for sundry civil expenses of

the government for the fiscal year ending June 30th, 1873, and for other purposes," all telegraph companies accepting the provisions of the Act approved July 24th, 1866, were required to transmit for the Secretary of War of the United States the results of observations at signal stations and reports for the Weather Bureau Departments for the government of the United States, under severe penalties fixed and defined by said Act last named.

Fourth. Your orator further says that complying with the provisions of said Act of Congress, approved July 24th, 1866, it did on or about the 8th day of June, 1867, duly file with the Postmaster General of the United States its written acceptance of all the restrictions and obligations of the said Act, and thereupon your orator became entitled to all the rights and privileges conferred by said Act, and burdened with all the obligations imposed by said Act, and that it has at all times since the filing of said written acceptance, fully performed all obligations and requirements of
3 said Act, and has, as part of the postal equipment of the United States, and an instrumentality of the Postal Department of the United States, carried upon its lines of telegraph messages for the government of the United States for the several departments thereof, and for the people of the United States and the State of Arkansas, as prescribed and required in and by the provisions of said Act.

Fifth. Your orator further says that it was organized as a telegraph Company in the year 1851, and immediately thereafter begun the work of construction and operation of telegraph lines in the State of New York and other States, and has continuously since that time been engaged in the work of constructing and operating telegraph lines for the rapid dissemination of intelligence and has constructed and acquired a continuous system of telegraph lines which now extend through the States and Territories of the United States, and into the borders of the Dominion of Canada, and connect with telegraph lines in the Republic of Mexico, with telegraph lines of the Central and South American Republics; and also connect by means of submarine cables with the telegraph systems of foreign countries; that at the present time its said system of telegraph lines, operated and controlled by it as aforesaid, comprises over 192,000 miles of poles and cables, and over 900,000 miles of wire; that upon the said system of telegraph lines your orator has over 23,000 offices, and transmits yearly about 65,000,000 messages, for the public and for the government of the United States and for the governments of foreign countries, exclusive of messages transmitted upon regular business, and exclusive of messages for your orator, and exclusive of messages forwarded by private parties leasing wires from your orator; that said system of lines has been built up so as to connect with and be largely operated from the central office of your orator,
which is situated in the City of New York, and the said lines
4 radiate therefrom to all the important cities and commercial centres and to many thousand towns and villages in the United States and North America and through ocean cables, land lines above described, to all the important commercial centres of

this country and the continent of Europe, and through lines there situated with the telegraph lines in all parts of the world; that among the lines of telegraph forming a component part of the said system of your orator, and connected with its main office aforesaid, in the City of New York, are telegraph lines within the said State of Arkansas, most of which lines in said State have been constructed in said State since the acceptance by your orator of the terms and conditions of said Act of Congress approved July 24th, 1866. That the complainant's said lines of telegraph within the said State of Arkansas are upon the public domain and upon the military and post roads of the United States only, and the complainant's said lines of telegraph are part of the postal routes and part of the postal establishment of the United States and as such the complainant has, under the Constitution and Laws of the United States, the power and is under the duty and obligation to transmit all messages for the government and for the public generally just as much and as fully with respect to messages between points within the said State as respect to interstate messages.

Sixth. That said lines of telegraph existing in the said State of Arkansas, and hereinbefore described, have been constructed by your orator with the consent and permission of the said State, and in accordance with the laws of the same, and your orator has invested in the said lines of telegraph now in said State more than $153,000.00; that continuously since the construction of said lines of telegraph your orator has used the said lines for the transmission of telegraph messages for the government of the United States and the several departments thereof, and for the public, as an instrumentality of the Postal Department and of commerce, wholly within the State of Arkansas, and also for interstate commerce and commerce between points in said state and foreign countries, and thus said telegraph lines have been continuously employed in domestic, interstate and foreign commerce since their construction; that your orator has complied with all the reasonable, just and valid provisions and requirements of the laws of said State of Arkansas at all times, and is now complying in all respects with the reasonable, just and valid provisions and requirements of the laws of the said State, and expects and intends always to do so.

Seventh. On or about the 13th day of May, 1907, the Legislature of said State passed an Act entitled "An Act to permit foreign corporations to do business in the State of Arkansas, and fixing fees to be paid by all corporations," and that on said date the said Act was approved by the Governor of said State, and it was provided in said Act that the same should go into effect and be in force from and after its passage, a copy of which Act is hereto attached, marked Exhibit "A" and made part hereof. That one of the provisions of said Act is that every foreign corporation before authority shall be granted to it to do business in said State, shall file with the Secretary of State a statement of its assets and liabilities, and the amount of capital employed in the State, and name an agent upon whom process may be served, and a resolution adopted by its Board of Directors consenting that service of process on any agent of said

company in said State, or upon the Secretary of State, in any action brought or pending in said State, shall be sufficient service upon said company; and your orator says in conformity with the provisions of the said Act, it duly caused to be passed by its Board of Directors a resolution, and has tendered a duly authenticated copy of said resolution and of said statement, and has offered to the Secretary of State all reasonable fees for the filing and recording of the said papers, but the said Secretary of State has refused and re-
6 fuses to file the same unless your orator will pay to the said Secretary of State a fee of $75. upon the first $100,000 of its capital stock, and $25 upon each addition $100,000 of its capital stock; that your orator has a total authorized capital stock under the laws of the State of New York representing its entire system of telegraph lines, properties and interests in ocean cables, real estate, etc., of $100,000,000 its real estate valued at several million dollars being situated wholly outside of the State of Arkansas, and that the total sum demanded by the said Secretary of State on account of this, its entire capital stock, as described, and to be paid to the said State of Arkansas as a condition of its right to continue to do business within said State of Arkansas amounts to the sum of $2,050; that the said defendant claims to be acting under the authority of the said Act of the said State of Arkansas, passed on the 13th day of May, 1907, as hereinbefore set forth. That on the 21st day of May, 1907, complainant filed a suit in this Court praying that the several prosecuting attorneys of the State of Arkansas be enjoined from instituting proceedings against it to recover the penalties set forth in the Act of the Arkansas Legislature hereinbefore mentioned. The said Act provides that if any foreign corporation doing business in the State of Arkansas shall institute any suit or proceeding against any citizen of the State of Arkansas in any Federal Court, it shall be the duty of the Secretary of State to forthwith revoke the authority of said company and its agents to do business in this State and to publish such revocation in some newspaper of general circulation published in this State, and if such corporation shall thereafter continue to do business in this State it shall be subject to the penalties of said Act for each day it shall continue to do business in the State after such revocation. That the penalty provided in said Act is not less than $1,000 per day, to be recovered before any Court of competent jurisdiction, and said Act makes it the
7 duty of the prosecuting attorneys to institute suits for said penalty. Said Act further provides that if any foreign corporation shall fail to comply with said Act it cannot make any contract in Arkansas which can be enforced by it either in law or equity, and the subsequent complying with said Act on the part of any corporation after suit is instituted on any of its contracts shall in no way validate said contracts.

That the defendant threatens to, and will, unless restrained by the order of this Honorable Court, proceed to promulgate a proclamation that the authority of complainant to do business in the State of Arkansas has been revoked and unless restrained by this Honorable Court will publish said proclamation in some newspaper of general

circulation published in the State of Arkansas, thereby making it appear that complainant is subject to the penalties prescribed in said Act, and making it appear that it is the duty of the prosecuting attorneys of the various counties of the State of Arkansas to institute suits for said penalties.

Eighth. Your orator further alleges that its said lines of telegraph located and constructed in said State, as hereinbefore set forth, and used by it for the purpose of domestic, interstate and foreign commerce, and of communication between the people of the United States and the State of Arkansas, and for the business of the Government of the United States, are of value only as they can be used as they have been designed and planned to be used, and that the said State of Arkansas has no power or authority to prevent your orator from using the same for foreign and interstate commerce, or for the transmission of messages thereon for the Government of the United States as a postal instrumentality and for speedy communications among the citizens of the said State of Arkansas who desire to use the same for the transmission of intelligence, and that the said defendant's action will deprive your orator of this
8 right to use the same as an agency of the Postal Department of the United States for the purposes for which the same were constructed if the defendant is permitted to enforce the provisions of the said alleged Act of the State of Arkansas.

Ninth. Your orator further showeth to your Honors that the gross income of your orator from its purely local and domestic business in the State of Arkansas has for ten years last past averaged about $32,000 a year, and that the cost to your orator for doing said amount of gross business has averaged at least $20,000 a year; that the amount of its capital devoted to or utilized in the transaction of such domestic and intra-state business would not exceed $153,000; that it pays to the State of Arkansas each and every year, as taxes upon its property in said State about $12,000.

Tenth. And your orator further alleges that the deprivation of the right to use the said telegraph lines for the transmission of messages over the same as the same are constructed and designed to be used, would almost entirely destroy the value of the same to your orator, for the reason that the said lines are solely to be used as the same are located and constructed, and if your orator were deprived of the right to use the same the material in many of the said lines would not pay the cost of taking down and removal of the same from the said State, and that your orator therefore alleges that the said Act is unconstitutional and void as to your orator, in that it seeks by its provisions to confiscate and destroy the value of the property of your orator without any provision for the compensation therefor to your orator, and therefore deprives your orator of the equal protection of the law, and takes the property of your orator without due process of law.

Eleventh. And your orator further alleges that the said Act of the Legislature levies an unequal burden upon your orator as compared with corporations of the said State, in that domestic cor-

porations organized and existing at the time of the passage
9 of said law are not required to pay into the treasury of the State any sum whatever upon the capital stock of the same, but said domestic companies may continue their business without the payment of any sum, while foreign corporations, including those which like your orator, are already established in said State, under the protection thereof, are required to pay a large sum measured by their entire capital stock for the privilege of continuing their established and existing business, whether the same related to domestic commerce, or interstate and foreign commerce, or not.

Twelfth. Your orator further says that the Constitution and Laws of the State of Arkansas provide that foreign corporations doing business in the State of Arkansas shall be entitled to all the rights and privileges of domestic corporations, and your orator says that said Act of the Arkansas Legislature is unconstitutional in imposing greater burdens on foreign corporations than is imposed on domestic corporations of the same class.

Thirteenth. Your orator further alleges that in and by the said Act it is provided that in case of the failure to pay the said exaction above named, on account of the capital employed in the State and its capital stock employed out of the State, your orator is forbidden to make any contract within the State, enforceable either in law or in equity, whether the same relates to domestic, interstate or foreign commerce, and as an agent of the United States to make contracts within said State of Arkansas, and in attempting to invalidate all contracts of every nature and description made by your orator in the performance of its duties to the Government of the United States and to the public; and in so providing the said Act is unconstitutional and void, in that it deprives your orator of the equal protection of the law, and undertakes to lay a burden upon all the property of your orator, whether within the said State of Arkansas, or without the said State of Arkansas, and seeks to enforce
10 an illegal exaction from your orator for the privilege of using its property for the transaction of its business as an agency of the Postal Department of the United States, and as an instrumentality of domestic, interstate and foreign commerce.

Fourteenth. Your orator further says that it originally entered the State of Arkansas and constructed its lines of telegraph and operated the same as hereinbefore described with the consent of the said State of Arkansas some thirty or forty years ago, and during all the intervening years has continued to extend and operate its lines of telegraph within said State with the consent of said State, and said State from time to time through its legislative enactments has recognized the right of your orator to transact the business aforesaid in the State of Arkansas and from time to time has passed laws regulating the conduct and affairs of your orator's business in said State, as shown by numerous statutes to which your orator begs leave to refer; and your orator avers that it is now, and for more than thirty years past has been, a foreign corporation, doing business in said State with the full knowledge and acquiescence of said State, and in reliance upon such license and ac-

quiescence has expended large sums of money in said State for the purpose of transmitting messages between the people of said State, to-wit, the sum of $153,000, and your orator avers that the said State may not withdraw its said license from your orator and expel it from said State; and that the enactment of the legislature of said State of May 13th, 1907, herein complained of, impairs the obligation of the contract created as aforesaid between the said State and your orator, and so violates the Constitution of the United States.

Your orator respectfully represents that if the defendant is permitted to proceed with his threatened unlawful acts in issuing the proclamation that complainant is not authorized to do business in the State of Arkansas, and shall publish such proclamation in a newspaper of general circulation, the result of said unlawful
11 acts will be great damage to this complainant, for which it has no adequate remedy at law, and of a character and extent irremediable. Your orator says that if said defendant proceed with the unlawful acts hereinbefore mentioned, it would then appear to be the duty of each prosecuting attorney in the State of Arkansas to institute suits against this complainant for penalty of $1,000 per day for each day that it does business in the State of Arkansas, and this would bring about a multiplicity of suits. Your orator further says that it has many agents and employees in the State of Arkansas whose entire time and attention is required to dispatch the business of complainant and to transmit the telegrams sent by officers of the United States government in furtherance of governmental affairs. That the said proclamation of the said defendant and his publication of it as hereinbefore described, setting forth as it purposes to do a revocation of all authority to complainant and its agents to do any business in this State of whatever character, will tend to demoralize said agents and employees and interfere with the proper discharge of their duties to complainant, the United States Government and to the public; and the said proclamation and the said publication of it will tend to create with the public and with the patrons of complainant a belief that complainant is not authorized to serve its patrons and the public, and will necessarily decrease complainant's revenues and greatly damage its established business. That complainant of necessity makes contracts in the State of Arkansas, which are to be performed by the other party to them, and has large sums of money owing to it in the State of Arkansas by virtue of said contracts, and has other considerations owing to it by the other party to said contracts. That the necessary effect of defendant's proclamation and the publication of it will create with parties who have contract obligations to perform for complainant, a belief that the said contracts cannot be enforced against them, and will necessarily lead to a failure on the part of said parties or a large part of them,
12 to perform their contracts, and will necessitate a multitude of suits by this complainant to enforce said contracts. Your orator further says that the damage which will be done to it by the said proclamation and the publication of it will be of vast extent and irremediable, and that the damage to your orator will be far in

excess of $2,000 and will be damage for which your orator has no adequate remedy at law.

Forasmuch, therefore, as your orator can have no adequate relief except in this Court, and to the end that the defendant hereinbefore named may, if he can, show why your orator should not have the relief hereby prayed, make full disclosure of all the matters aforesaid, from the best of their knowledge and belief, a full, true and perfect answer make, to matters hereinbefore stated and which affect him, answer under oath being expressly waived, your orator prays this Court will determine, adjudge and decree that the said Act of the State of Arkansas, approved, on the 13th day of May, 1907, entitled, "An Act to permit foreign corporations to do business in Arkansas and fixing fees to be paid by all corporations," shall be adjudged and decreed to be unconstitutional, illegal and null and void—that said defendant, or his agent, be restrained and enjoined from attempting to revoke or proclaim that he has revoked the authority of your orator to do business in the State of Arkansas, and from attempting to publish said pretended revocation in a newspaper, or through any other agency, and for such other and further relief as the case may require and to your Honors may seem just.

May it please your Honors to grant unto your orator a writ of Subpœna directed to Oswald C. Ludwig, as Secretary of State of the State of Arkansas, commanding him by a certain date under certain penalty, to be and appear before your Honors in this Honorable Court, and to stand, abide and perform such order and decree as to your Honors shall be agreeable to equity and good conscience.

13 (Signed) THE WESTERN UNION TELEGRAPH COMPANY.

By GEORGE H. FEARONS,
HENRY D. ESTABROOK,
RUSH TAGGART, AND
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Solicitors for Complainant.

STATE OF ARKANSAS,
County of Pulaski:

I, George B. Rose, am Attorney of the Western Union Telegraph Company, the complainant herein, and state that the foregoing allegations are true.

(Signed) GEO. B. ROSE.

Subscribed and sworn to before me this 31st day of May, 1907.
W. P. FEILD, *Clerk.*

Endorsed: Filed May 31st, 1907. W. P. Feild, Clerk.

14 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas.

Be it remembered, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of

Arkansas, begun and holden on Monday, the 1st day of April Anno Domini, One Thousand Nine Hundred and seven at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. District Judge presiding and holding said Court, the following proceedings were had, to-wit on June 1st, 1907:

1460.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas

On this day comes the complainant by its solicitors and presents to the Court its verified bill of complaint and prayer for a temporary injunction, and the Court having considered the same and being sufficiently advised in the premises—

It is ordered and adjudged that the said defendant show cause on Friday, June 7th, 1907, at ten o'clock A. M. why a temporary injunction as prayed in the bill be not granted.

And it is further ordered that in the meantime and until the further order of the Court, the said defendant, his agents and attorneys be restrained from revoking or attempting to revoke or to proclaim that he has revoked the authority of the complainant to continue doing business in the State of Arkansas as a telegraph Company.

That complainant execute a bond to defendant in the sum of Ten Thousand Dollars ($10,000.00), conditioned that it will pay to the defendant all damages he or the State of Arkansas may sustain by reason of this order if the same is adjudged to have been wrongfully obtained, the said bond to be approved by a Judge of this Court or the Clerk.

And it is further ordered that a certified copy of this order
15 be served on the defendant forthwith.

(Signed) JACOB TRIEBER, *Judge.*

And on the same day the following proceedings were had to-wit:

1460.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas.

Comes the complainant by Rose, Hemingway, Cantrell and Loughborough, Esqs., its solicitors, and files herein its injunction bond in the sum of Ten Thousand Dollars ($10,000.00) with the American Surety Company of New York as surety, which bond is approved by the Judge of this Court as sufficient.

Which injunction bond is in words and figures following, to-wit:

In the United States Circuit Court for the Western Division of the Eastern District of Arkansas.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas.

Bond for Injunction.

We, the Western Union Telegraph Company and the American Surety Company, hereby undertake that we will pay to the defendant Oswald C. Ludwig, and to the State of Arkansas, all damages which he or it shall sustain, not to exceed the sum of Ten Thousand Dollars, by reason of the restraining order issued herein on June 1st, 1907, and directed to the defendant, restraining him from issuing a proclamation that the authority of the plaintiff to do business
16 in Arkansas had been revoked, if it be finally adjudged that such restraining order was wrongfully issued.

(Signed) THE WESTERN UNION TELEGRAPH COMPANY,
By ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH, *Att'ys.*
AMERICAN SURETY COMPANY OF NEW YORK,
By J. M. MOORE, *Resident Vice-President.*

Attest:
[SEAL.] H. P. EDMONSON,
Resident Ass't Secretary.

Approved:
(Signed) JACOB TRIEBER, *Judge.*

Extract from the Record Book of the Executive Committee of the American Surety Company of New York.

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 20th day of February, 1907. The following resolutions were adopted:

Resolved, That John M. Moore and W. B. Smith of Little Rock, Arkansas, be and they hereby are and each of them is hereby constituted and appointed a Resident Vice-President of this Company, at the Town or City, aforesaid, with full power and authority to execute and deliver any and all surety bonds and undertakings, for or on behalf of this Company in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of a Resident Assistant Secretary of this Company.

Resolved, That H. P. Edmonson and J. F. Lenon of Little Rock, Arkansas, be and they hereby are and each of them is hereby constituted and appointed a Resident Assistant Secretary of this Company at the Town or City, aforesaid, with full power and authority

o attest any and all surety bonds and undertakings, for or on be-
alf of this Company, in its business and in accordance with its
harter; such bonds and undertakings to have in every instance
owever, the seal of this Company affixed thereto, and to be exe-
uted on behalf of the Company by one of its Resident Vice-Presi-
lents."

7 STATE OF NEW YORK,
County of New York, ss:

I, F. J. Parry, Assistant Secretary of the American Surety Com-
any of New York, do hereby certify that I have compared the fore-
going extracts and transcripts, from the Record Book of the Execu-
ive Committee of the American Surety Company of New York, with
he original record of the Executive Committee, and that the same
re correct extracts and transcripts therefrom as they appear of
ecord and are set forth and contained in said Record Book; and I
urther certify that I have compared the foregoing resolutions with
he originals thereof, as recorded in the Minute Book of said Com-
any, and do certify that the same are correct and true transcripts
herefrom, and of the whole of said original resolutions; and that
he said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company at the City
of New York, this 20th day of March, 1907.

[SEAL.] (Signed) F. J. PARRY,
Assistant Secretary.

Endorsed: Filed June 1st, 1907. W. P. Feild, Clerk.

And on June 14th, 1907, the following proceedings were had to-
wit:

1460.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas.

On this day comes the defendant by W. F. Kirby, Attorney Gen-
eral of the State of Arkansas, and files herein his demurrer and
answer; and the motion for a temporary injunction pending the final
determination of this cause coming on to be heard, come the parties
herein by their respective solicitors, and the Court having
18 heard the argument of counsel and being sufficiently ad-
vised,

It is ordered, adjudged and decreed by the Court that a temporary
injunction issue against said defendant enjoining and restraining
him until the further order of the Court from revoking and pub-
lishing a revocation of the privilege of the said complainant to carry
on business in this State as threatened to do under the provisions of
the Act of the General Assembly of the State of Arkansas, entitled
"An Act to permit foreign corporations to do business in Arkansas,
and fixing fees to be paid by all corporations," approved May 13th,

1907. That said complainant execute a bond to the defendant in the penal sum of Ten Thousand Dollars ($10,000.00), conditioned that it will pay to the defendant or the State of Arkansas, or any other person entitled thereto, which he or they may sustain by reason of the granting of this temporary injunction, if upon a final hearing it is adjudged that the same was wrongfully granted.

And thereupon the said defendant by his solicitor waived service of formal restraining order herein, and agreed that the entry of this order may be considered as service upon him.

(Signed) JACOB TRIEBER, *Judge.*

Which Demurrer and Answer are as follows:

In the United States Circuit Court for the Western Division of the Eastern District of Arkansas.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas.

Demurrer and Answer.

Comes the defendant, Oswald C. Ludwig, Secretary of State of the State of Arkansas, by William F. Kirby, Attorney General of the State of Arkansas, and demurs to the complaint filed herein
19 against him.

First. Because this Court is without jurisdiction to hear and determine this cause, the same being in effect a suit against the State of Arkansas, to prevent its enforcement of one of its criminal or penal statutes by a citizen of another State, and the Court is denied jurisdiction by Article Eleven of the Constitution of the United States and because the same is a suit in equity to enjoin the enforcement of a criminal or penal statute of the State of Arkansas.

Second. Because it does not state facts sufficient to constitute a cause of action nor warrant the relief prayed for.

Third. Because the said bill of complaint is wholly without equity.

Answering herein the defendant, Oswald C. Ludwig, Secretary of State of the State of Arkansas, in person and by his attorney, William F. Kirby, Attorney General of the State of Arkansas, comes and denies that the value of the subject matter of this suit and the amount in controversy is of the value of more than Two Thousand Dollars, exclusive of interest and costs, and that it is one arising under the Laws and Constitution of the United States.

The defendant is without any knowledge or information thereof sufficient to form a belief as to the allegations made in paragraphs two, three and four of the plaintiff's bill.

He denies any knowledge or information thereof sufficient to form a belief as to whether or not plaintiff's apparatus for and system of rapid dissemination of intelligence, its telegraph system and lines, cover the entire United States and ramify and extend therefrom into

all the remote corners of the earth as alleged in paragraph five.

20 He denies that plaintiff has constructed its telegraph system in the State of Arkansas with the consent and permission of the State and in accordance with the laws of the same, and that it has complied with the reasonable, just and valid provisions of the requirements of the laws of the State at all times and that it is now complying in any and all respects with such laws.

He denies that plaintiff has filed or offered to file with him as Secretary of State its charter, statement of its assets and certificate of appointment of agent under the act approved May 13th, 1907, and offered to pay the reasonable fees of filing and recording said papers as alleged.

He denies any knowledge or information thereof sufficient to form a belief as to the amount of capital plaintiff has invested in the State of Arkansas, and as to the amount received by it from its purely local and domestic business in the State of Arkansas as alleged in paragraph nine.

He denies that said Act is unconstitutional and void and that it seeks to confiscate the property of plaintiff or destroy its value and deprive it of the equal protection of the law and that it takes it- property without due process of law.

He denies that said defendant has ever complied with the laws of the State of Arkansas or in good faith tried to do so, and that it has ever been issued a certificate, permit or license to do business in the State of Arkansas, and states the truth to be that the plaintiff at the time of filing its articles of incorporation in an apparent attempted conformance with the requirements of the laws intentionally and with a design to mislead, filed with the Secretary of State, what purported to be its articles, representing that its capital stock was about $300,000 and only offered to pay upon that amount, when in truth and in fact if this defendant's information is correct the capital stock of said plaintiff was $100,000,000 at the time.

21 He denies that said plaintiff has constructed and operated its lines for thirty or forty years in the State by the consent of the State and during all this time has continued to extend and operate its lines of telegraph within the State with the consent of the State and that the State has recognized its rights to transact business herein and that it has by so doing acquired any right by prescription to do business in the State of Arkansas without regard to the wishes of the people and without a compliance in any respect with the laws of this State and respectfully suggests that the Statute of Limitation does not run against a sovereign State.

Defendant admits that said plaintiff company is a foreign corporation and doing purely a domestic and intra-state business as alleged, that it has sued citizens of this State in the Federal Court as alleged without their consent, that it has refused to comply with said Act of the Legislature and is now attempting by this proceeding to enjoin this defendant from enforcing and putting in force the additional penalty of said Act against it.

Defendant denies each and every allegation made in said plain-

tiff's most verbose and unnecessarily voluminous thirteen page bill not here specifically admitted and prays that the Court because of the shortness of life may not require him to enter specific denial of the exceedingly numerous and unnecessary allegations of fact and legal conclusions set forth therein.

Wherefore having fully answered defendant prays that he be dismissed with his costs and for all other proper relief.

(Signed) OSWALD C. LUDWIG,
Secretary of State of the State of Arkansas,
By W. F. KIRBY,
Attorney General of the State of Arkansas.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

(Signed) W. F. KIRBY,
Attorney General.

22 I, Oswald C. Ludwig, Secretary of State of the State of Arkansas, do solemnly swear that this demurrer is not interposed for delay.

(Signed) OSWALD C. LUDWIG.

Subscribed and sworn to before me this 13th day of June, 1907.
W. P. FEILD, *Clerk.*

Endorsed: Filed June 14th, 1907. W. P. Feild, Clerk.

And on June 17th, 1907, the following proceedings were had, to-wit:

1460.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas.

Comes the complainant by Rose, Hemingway, Cantrell and Loughborough, Esqs., its solicitors, and files herein its bond for injunction in the sum of Ten Thousand Dollars, with the American Surety Company of New York as surety, which bond is approved by the Judge of this Court as sufficient.

Which Bond is as follows:

the United States Circuit Court for the Eastern District of Arkansas, Western Division.

WESTERN UNION TELEGRAPH COMPANY
vs.
WALD C. LUDWIG, as Secretary of State of the State of Arkansas.

We, the Western Union Telegraph Company, as principal, and the American Surety Company, as surety, hereby undertake that we will pay to the defendant, Oswald C. Ludwig, and to the State of Arkansas and to any other person, all damages ich he or they shall sustain, not to exceed the sum of Ten Thou-d Dollars, by reason of the temporary injunction herein directed the defendant restraining him from issuing a proclamation that authority of the plaintiff to do business in Arkansas has been oked, if it be finally adjudged that such restraining order was ongfully issued.

(Signed) THE WESTERN UNION TELEGRAPH COMPANY,
By ROSE, HEMINGWAY, CANTRELL AND LOUGHBOROUGH.
AMERICAN SURETY COMPANY OF NEW YORK,
[SEAL.] By W. B. SMITH, *Resident Vice-President.*
Attest:
H. P. EDMONSON,
Resident Ass't Secretary.

Approved:
(Signed) JACOB TRIEBER, *Judge.*

Endorsed: Filed June 17th, 1907. W. P. Feild, Clerk.

And on July 20th, 1907, the following proceedings were had, wit:

1460.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Sec'ty of State, &c.

Comes the complainant by Rus-l Taggart, Henry D. Estabrook d Rose, Hemingway, Cantrell and Loughborough, Esqs., its so-itors and by leave of the Court files herein its amendment to bill. Which amendment to bill is as follows:

United States Circuit Court, Western Division of the Eastern District of Arkansas.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas.

24 *Amendment to Bill.*

Comes the plaintiff, and leave of the Court having been first obtained, makes this amendment to its bill of complaint herein, and says:

That on March 31st, 1885, the General Assembly of the State of Arkansas enacted and the Governor approved the law entitled "An Act granting certain privileges to and prescribing certain duties of telegraph and telephone companies, and for other purposes" in which it is provided that any corporation organized under the laws of Arkansas or any other State or of the United States may construct, operate and maintain telegraph lines necessary for the speedy transmission of intelligence along and over the public highways and the streets of the cities and towns of this State, or across the waters and over any lands or public works belonging to the State, and on and over the lands of private individuals and along and parallel to any of the railroad- and turnpikes of the State of Arkansas, and over the bridges, trestles and structures of such railroads, and by the terms of said Act foreign corporations engaged in the business of transmitting intelligence by telegraph were invited and licensed to enter and continue in this State and to construct, operate and maintain telegraph lines therein and to transact their business as a foreign corporation therein. In consideration of the rights and privileges conferred by said Act, said Act provided that every telegraph company shall, in the case of war, insurrection or civil commotion of any kind and for the arrest of criminals, give immediate dispatch at the usual rates of charge to any message connected therewith to any officer of the State or of the United States.

That complainant has performed all and singular the duties and obligations imposed upon it by said Act and had prior thereto constructed and had in operation some lines of telegraph in this State and was engaged in business herein as a foreign corporation and had invested in its said telegraph plant many thousand dol-
25 lars. That after the enactment of said Act it extended its lines and increased its offices and expended many thousand dollars additional in equipping and perfecting its plant for the transmission of intelligence by telegraph, and has in the said many offices wires, poles and electrical appliances and has in said State a plant in which is invested —— Thousand Dollars, much of which has been invested under the privilege and agreement made by the State of Arkansas to telegraph companies embodied in said Act. That much of its equipment consists of poles and wires erected and strung connecting its various offices in the State and offices outside

the State, and to prohibit their use as a part of the telegraph system erected in the State of Arkansas by complainant would be to destroy their value, as the poles and wires except as part of said telegraph system possess little value. Complainant further says that the invitation and privileges extended by the said Act of the Legislature of Arkansas constituted a contract, and the action thereon by complainant and its assumption of the obligations therein imposed constituted a contract between the complainant and the State of Arkansas, and on the faith of the integrity of said contract complainant has made the investments and created the plant hereinbefore described. That in the year 1887 the General Assembly of the State of Arkansas enacted the law which was approved April 4th that year, entitled, "An Act to prescribe the conditions upon which foreign corporations may do business in this State," and said Act provided that before any foreign corporation should begin business in this State it should by its certificate designate an agent of such corporation upon whom the service of process might be had and thereby jurisdiction given over said corporation to any of the Courts of this State. That in compliance with said Act complainant filed with the Secretary of State a certificate designating an agent upon whom service of process might be had, and thereafter continued
26 in business in this State and made investments in equipping and extending its telegraph lines.

Your orator further says that the Constitution of the State of Arkansas provides that foreign corporations may be authorized to do business in this State and shall be subjejct to the same regulations, limitations and liabilities as like corporations of this State and shall have the same rights and privileges as like corporations of this State. Your orator says that the Act of the General Assembly of 1907 under which defendant proposes to act, provides that foreign corporations which have heretofore been in the State and desire to continue herein must file the statements, stipulations and documents mentioned in said Act and shall pay the fees based upon the amount of their capital stock and mentioned in said Act, while the same or like burdens are not imposed upon corporations created by the State of Arkansas prior to the enactment of said law and continuing in business in Arkansas after the enactment of said law, and that this feature of said Act does not impose the same liabilities upon domestic corporations that are imposed upon foreign corporations and does not give foreign corporations the same rights that it does domestic corporations. And said Act further provides that should a foreign corporation institute a suit in the Federal Court its license to do business in this State shall be revoked and the defendant threatens to revoke the license of the complainant to do business in this State because it has instituted a suit in the Federal Court. Your orator further says that the Act does not prohibit domestic corporations from instituting suits in the Federal Courts and therefore said Act discriminates against foreign corporations and in favor of domestic corporations and does not give foreign corporations the same rights and privileges as it does domestic corporations in this respect. Said Act further provides that should any foreign corporation fail

to comply with its provisions it shall be subject to a fine of not less than One Thousand Dollars, and said fine shall be made a
27 daily fine in the event the license of the corporation is revoked because it institutes suit in the Federal Court. It says that domestic corporations are not subject to a fine for any violation of the provisions of said Act, and therefore the said Act imposed greater liabilities upon foreign corporations than it does upon domestic corporations and does not extend to foreign corporations the same rights and privileges as it does to domestic corporations. Said Act further provides that if any foreign corporation shall fail or refuse to comply with its terms it can make no contract in this State which can be enforced by it, but said Act imposes no such penalty upon domestic corporations which fail to comply with its terms. Your orator therefore says that said Act imposes greater liabilities upon foreign corporations than it does upon domestic corporations and extends to domestic corporations greater rights and privileges than it does to foreign corporations.

Your orator further says that said Act is unconstitutional and void under the Constitution of the State of Arkansas for the reasons hereinbefore mentioned and is unconstitutional and void under the Constitution of the United States because it seeks to impair the obligations of contracts and its operation would impair the obligation of the contract between the State of Arkansas and complainant.

Wherefore your orator humbly prays that it be afforded all and particular the relief prayed for in the prayer of its original bill and prays that this amendment be considered as embodied in said original bill as a part thereof.

(Signed) HENRY D. ESTABROOK,
RUSH TAGGART, AND
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Complainant.

Endorsed: Filed July 20th, 1907. W. P. Feild, Clerk.

28 UNITED STATES OF AMERICA,
Western Division of the Eastern District of Arkansas:

Be it remembered, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 21st day of October, *Anno Domini*, One Thousand Nine Hundred and seven at the United States Court Room, in the city of Little Rock, Arkansas, the Honorable Jacob Trieber, U. S. District Judge presiding and holding said Court, the following proceedings were had, to wit: on November 22nd, 1907:

1460.

THE WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas.

Now on this day the demurrer of the defendant to the bill of complaint herein comes on to be heard, and comes the complainant by Rose, Hemingway, Cantrell and Loughborough, Esqs., its solicitors, and the defendant by W. F. Kirby, the Attorney General as his solicitor; and the Court being sufficiently advised in the premises,—

It is considered and ordered that the said demurrer be overruled for the reasons stated in the opinion in the case of the Chicago, Rock Island and Pacific Railway Company *vs.* Ludwig &c.

Whereupon the defendant announces that he will plead no further but will stand upon said demurrer.

It is therefore considered, ordered and decreed that the injunction heretofore granted in this case be made perpetual and that the defendant pay all the costs of this suit; and thereupon the defendant files herein his prayer for appeal and assignment of errors and prays an appeal to the Supreme Court of the United States, which is granted upon his filing a bond in the sum of Three Hundred Dollars ($300.00).

(Signed) JACOB TRIEBER, *Judge.*

The following opinion of Court was filed in the case of Chicago, Rock Island & Pacific Ry. Co. *vs.* Ludwig, as referred to in above order of court:

29 In the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Complainant,
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas,
Defendant.

On Demurrer to Bill for Injunction.

The Bill charges that complainant is a railway corporation created by and existing under the laws of the States of Iowa and Illinois, engaged in operating lines of railroad and conducting a business as a common carrier in and through the States of Illinois, Iowa, Minnesota, South Dakota, Nebraska, Colorado, Missouri, Kansas, Tennessee, Arkansas, Louisiana and Oklahoma and Indian Territories. That on May 24th 1904, it filed a certified copy of its articles of incorporation with the Secretary of the State of Arkansas, paid the fees prescribed by law and otherwise complied with all the laws of the State of Arkansas regulating the terms and conditions upon

which railroad companies organized and existing under the laws of states or a territory of the United States other than the State of Arkansas are permitted to do business in that State; and thereby it became a domestic corporation of said State; that its business is interstate as well as intrastate; that for the purpose of conducting its business in this State as authorized by its laws it leased for a valuable consideration for a term of nine hundred and ninety-nine years all the rights, privileges, franchises and other property of the Choctaw, Oklahoma and Gulf Railroad Company, a corporation organized under an Act of Congress, and owning and operating a railroad through the State; that complainant now owns, leases and operates
604.13 miles of railroad, right of way, depots, station grounds,
30 shops, ware-houses, rolling stock, etc., assessed for taxes in the State of Arkansas by the authorities of said State at $3,912,-482.00; that now the defendant, as Secretary of State, notwithstanding the aforesaid premises, threatens to forfeit complainant's right to conduct its business as a railroad company in this State by authority, as he claims, of an Act of the Legislature of the State of Arkansas, approved May 13th, 1907, for the reason that the complainant removed a cause instituted against it by a citizen of this State is one of the Courts of the State to the United States Circuit Court for the Eastern District of Arkansas.

The Bill then attacks the constitutionality of the Act in so far as it applies to it upon several grounds, which it is unnecessary to set out, the principal grounds, which in the view of the Court determine this case and also the other cases submitted at the same time, being that its effect is to impair the obligations of a contract in violation of Section 10, Art. 1, and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

It is also charged that complainant conducts its business upon as economical a basis as it is safe and practicable to operate its railroad; that to enable it to safely maintain and operate its railroad it is necessary that it receive the revenues occasioned from handling of freight and passengers from points within the State of Arkansas; that if it is denied the right to handle such intrastate traffic and receive such revenues the receipts derived from handling of interstate traffic alone will not enable it to continue to pay the necessary expenses of maintenance and operation and handling of such interstate traffic and pay a fair return upon its investment.

The prayer of the Bill is for an injunction to prevent the defendant from revoking the charter, or its right to carry on business in
the State. The defendant demurs upon the grounds, *first*,
31 that this is in effect an action against the State and, therefore, not cognizable in a Court of the United States, as provided in the Eleventh Amendment to the Constitution of the United States, and *second*, that there is no equity in the bill.

The provisions of the Constitution and the various Acts of the Legislature of the State of Arkansas which it is necessary to consider in the determination of the issues involved are as follows:

Sec. 11, Art. 12 of the Constitution provides:

"Foreign corporations may be authorized to do business in this

State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; and, as to contracts made and business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property."

Sec. 2 of the Acts of the General Assembly of the State of Arkansas, approved March 13th, 1889, and digested as Sections 6743 to 6748 inclusive, is as follows:

"Any railroad company in this State, existing under general or special laws, may sell or lease its road, property and franchises to any other railroad company duly organized under the laws of any other State or Territory, whose line of railroad shall so connect with the leased or purchased road by bridge, ferry or otherwise, as to practically form a continuous line of railroad, and any railroad company in this State existing under general or special laws, may buy or lease, or otherwise acquire any railroad or railroads, with all the property, rights, privileges and franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad company or companies incorporated or organized within or without this State whenever the roads of such companies shall form in the operation thereof of a continuous line or lines. Provided, That before any such lease or sale, is valid it must be approved and ratified by persons holding or representing two-thirds of the capital stock of each of such companies respectively, at a stock-holders meeting called for that purpose; and any railroad company existing under the general or special laws of any other State or Territory may buy or lease, or otherwise acquire, any railroad or railroads, the whole or part of which is in this State, with all the rights, privileges and franchises thereto pertaining, or buy the stock and bonds, or guarantee the bonds of any railroad company incorporated or organized under the laws of this State, whenever the roads of such companies shall form in the operation thereof a continuous line or lines. Provided, That the road so purchased shall not be parallel or competing with the purchasing road; and any railroad company existing under the laws of any other State or Territory may extend and construct its railroad into and through this State. Provided, further,

32 That any company existing under the general or special laws of this State, or of any other State or Territory, to lease or buy a railroad and appurtenances, or to buy the stock or bonds, or guarantee the bonds of any railroad company incorporated and organized within this State, heretofore executed by the proper officers of such companies and ratified by the companies parties thereto, by the assent of persons holding two-thirds of the capital stock in each of such companies, expressed at a meeting of such stockholders called for that purpose, shall be taken and held to be binding from the date of its execution. Provided, further, That nothing in the

foregoing provisions shall be held or construed as curtailing the right of the State or counties through which said consolidated, leased or purchased road or roads may be located, to levy and collect taxes upon the same and the rolling stock thereof, pro rata, in conformity with the provisions of the laws of this State upon that subject. Provided, further, That before any railroad corporation of any other State or Territory shall be permitted to avail itself of the benefits of this act, or any part thereof, such corporation shall file with the Secretary of State of this State, a certified copy of its articles of incorporation, if incorporated under a general law of such State or Territory or a certified copy of the statute laws of such State or Territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such State; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this State, subject to all of the laws of the State now in force or hereafter enacted, the same as if formally incorporated in this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation, and, Provided further, That every railroad corporation of any other State which has heretofore leased or purchased any railroad in this State, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the Secretary of State of this State, and shall, thereupon, become a corporation of this State, anything in its articles of incorporation or charter to the contrary notwithstanding, and in all suits or proceedings instituted against any such corporation, process may be served upon the agent or agents of such corporation or corporations in this State, in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this State, organized and existing under the laws of this State."

Act of May 23rd, 1901, digested as Sections 6749 and 6750 of Kirby's Digest is as follows:

"The franchise and all charter rights whatsoever of any railroad company in and to all railroad, roadbed, bridge, depot or other railroad property, as well as the possession of, and right to operate same, which may have been acquired by such railroad under and by virtue of any lease, shall be forfeited and such railroad company ousted of its right thereunder to operate, possess or control the same, if such lease shall not have been made in conformity with the statutes governing the making of such leases, or if such lessee shall fail to maintain said property in good repair so as to afford safe and reasonably prompt facilities of travel to the public, or shall fail to furnish reasonable shipping accommodations for freight to its patrons.

33 "This act may be enforced at the instance of the State by her Attorney General, by information in the nature of *quo warranto*, or other proper suit in any Court having jurisdiction."

The Act of May 13th, 1907, under which it is now claimed the defendant is about to revoke complainant's franchise is as follows:

"SEC. 1. Every company or corporation incorporated under the laws of any other State, Territory, or Country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served. Provided, before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its Board of Directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any Court of this State, remove said suit or proceeding to any Federal Court, or shall institute any suit or proceeding against any citizen of this State in any Federal Court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation."

"SEC. 2. Any foreign corporation which shall fail to comply with the provisions of this Act, and shall do any business in this State, shall be subject to a fine of not less than $1,000, to be recovered before any Court of competent jurisdiction and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suit in the name of the State, for the use and benefit of the county in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered, and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make any contract in this State which can be enforced by it either in law or in equity, and the complying with the provisions of this Act after suit is instituted shall in no way validate said contract."

"SEC. 3. That all corporations hereafter incorporated in this State and all foreign corporations seeking to do business in this State shall pay into the treasury of this State for the filing of said articles a fee of $25.00 where the capital stock is $50,000.00 or under;

$75.00 where the capital stock is over $50,000.00 and not more than $100,000.00; and $25.00 additional for each $100,000.00 of capital stock."

34 Buzbee & Hicks & W. F. Evans for complainant.

W. F. Kirby, Attorney General of the State of Arkansas for the defendant.

TRIEBER, *D. J.*:

I.

In Western Union Telegraph Company *vs.* Andrews, 154 Fed. 95, this Court had occasion to pass upon the jurisdiction of national Courts in actions against officers of the State and determine when such an action is in effect a suit against the State within the meaning of the Eleventh Amendment to the Constitution. In that case the Court reviewed the authorities quite fully and it would serve no useful purpose to repeat them in this opinion. Among the conclusions there reached, and which the Court adheres to now, are the following:

"(*c*) The exemption of the State from judicial process does not protect its officers and agents from being personally liable to an action of tort by a private person whose rights or property they have wrongfully invaded or injured, even by authority of the State, and when the remedy at law is inadequate its officers may be restrained by injunction from doing positive acts for which they would be personally liable for taking or injuring plaintiff's property in violation of the Constitution or Laws of the United States."

"(*e*) The fact that the State has a governmental interest in the welfare of its citizens in compelling obedience to the legal orders of its officials for the benefit of the public at large is not that which makes the State as the organized political community a party in interest to the litigation. The interest must be one in the State as an artificial person, as distinguished from that of a government for the benefit of its citizens."

"(*g*) That an action to prevent the enforcement of a tariff which is unreasonable and confiscatory, and which is to be enforced by a commission or other officials who are merely acting as administrative agents for the State, is not one against the State, if the Act itself is unconstitutional and void as against the complainant."

A franchise to a railroad company to own and operate a railway is a valuable right and has always been held to be property. Dartmouth College *vs.* Woodward, 4 Wheat. 518; 4 L. Ed. 629, and numerous cases in which that case is cited and followed with approval, collected in 1 Roses' Notes on U. S. Reports, 914.

An interesting case showing that such a franchise is property of which a corporation cannot be deprived without compensa-
35 tion, even under the power of Eminent Domain, is Monongahela Navigation Co. *vs.* United States, 148 U. S. 312-329 where the Court said in speaking of such franchise, "The latter (meaning the franchise) can no more be taken without compensation than can its tangible corporeal property."

Upon the allegations of the bill, which for the purpose of determining the demurrer are confessed to be true, this is not an action against the State within the meaning of the Eleventh Amendment.

II.

That the State has the power to prevent a foreign corporation from doing business at all within its boundaries unless such prohibition is so conditioned as to violate the Federal or its own Constitution, has been finally determined in Security Mutual Life Ins. Co. *vs.* Prewitt, 202 U. S. 246, and is no longer open to question. As stated in the opinion of the Court:

"As the State has the power to refuse permission to a foreign insurance company to do business at all within its confines, and as it has the power to withdraw that permission when once given, without stating any reason for its action, the fact that it may give what some may think a poor reason or none for a valid act is immaterial."

But on the other hand it is equally well settled that if the State has induced the corporation to enter it by the granting of a franchise, which is in the nature of a contract, then it is protected in the enjoyment thereof by Art. 1, Sec. 10 of the National Constitution, prohibiting any State from passing any law impairing the obligations of a contract. Without citing the numerous authorities on that subject, it is sufficient to refer to the American Smelting Co. *vs.* Colorado, 204 U. S. 103, decided at the last term of the Court. Therefore, the only thing now left for determination in this case is what Acts of a State constitute a contract with a foreign corporation to do business in the State.

The statutes of Colorado construed in that case are not quite as strong as those of this State, for while that statute provided
36 that "Such corporations (foreign corporations permitted to do business in the State) should be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." Sec. 499 Mills Ann. Stat. of Colo. The Constitution of this State contains a similar provision (Art. 12 Sec. 14 *supra.*), and in addition thereto the statute regulating the right of foreign railroad corporations to do business in this State provides:

"And upon the filing of such articles of incorporation or such charter, etc. * * * such railroad company shall to all intents and purposes become a railroad corporation of this State, subject to all the laws of the State now in force or hereafter enacted, the same as if formally incorporated in this State, etc." Sec. 2 Act. March 13th, 1889, Chap. 34.

That these provisions clearly entitled a foreign corporation complying therewith to all the rights and privileges of a domestic corporation was decided in the American Smelting Co. case; but were there any room for doubt on that subject it has been removed by the decision of the Supreme Court of the State of Arkansas when construing the effect of that Act. As will be noticed by reference to

the Constitutional provisions of the State set out in the statement of facts the power "to condemn or appropriate private property" was expressly excluded, but the Supreme Court in Russell *vs.* St. L. & S. W. R. R. Co. 71 Ark. 451, expressly held that under the statute in question a foreign railroad corporation complying with the terms of the Act (as is charged in this bill to have been done by complainant) became a domestic corporation of this State "with all its rights and powers, subject to all its duties and obligations" including the right of Eminent Domain.

The fact that a corporation for jurisdictional purposes in the Courts of the United States was still held to be a foreign corporation, as was decided by the Supreme Court in St. L. & S. F. R. R. Co. *vs.* James, 161 U. S. 545, was held not to affect that question, the Court distinguishing that case from the one before it. This was
37 reaffirmed by that Court in St. L. & S. W. Ry. *vs.* Hale, 8 Ark. L. R. 737 decided March 18, 1907. 82 Ark. 175.

Since the rendition of the opinion in the American Smelting Co. case, the identical question came before the Supreme Court of South Carolina in British American Mortgage Co. *vs.* Jones, 56 S. E. Rep. 983, and that Court following the decision of the Supreme Court of the United States, held that "where a foreign corporation paid the license tax required by the Act of 1893 to enable it to do business in the State, it cannot be required by the Act of 1904 to pay an additional tax not levied on domestic corporations, such a requirement being an impairment of the contract of admission to do business in the State on the same terms as domestic corporations."

But assuming that such foreign corporation when entering the State in pursuance of the laws of Arkansas has not become a domestic one, it must still be held that the decision of the Supreme Court in the Prewitt case is limited by the proviso that the revocation of the right of a foreign corporation to do business in a State other than that of its creation must not in any way impair the obligations of a contract entered into by the State with a foreign corporation.

The learned Attorney General of the State appearing for the defendant frankly admitted that the decision of the Supreme Court of the United States on questions of this nature involving a right claimed under a provision of the Constitution of the United States is conclusive, not only on this but all other Courts, including the Supreme Court of the State. But he insists, and very ingeniously argues, that "if the foreign corporation became entitled to all the rights and privileges of a domestic corporation of like nature, as the Constitution of this State also provides that 'it shall exercise no other regular powers, privileges or franchises than may be exercised by a like corporation of this State' it is subject to Sec. 6 of Art. 12 of that instrument, which provides that 'the General Assembly shall have the power to alter, revoke or annul any charter of incorporation
38 now existing and revokable at the adoption of this Constitution, or that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State; in such manner however, that no injustice shall be done to the corporators; and therefore he insists the Legislature has the right to revoke their

charter or right to do business in this State as a foreign corporation, without stating any reason for its action or what it may think a proper reason."

Assuming without deciding, that this provision giving to the Legislature the right to amend, revoke, or annul, any charters granted by it applies to foreign corporations as well as domestic corporations, and also assuming that the Courts are powerless to inquire as to its reasons, the determination by the Legislature being conclusive, still this provision must be taken in connection with the constitutional provision prohibiting the impairment of the obligations of a contract, as the national Constitution provides "that this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States shall be the supreme law of the land and the judges in every State shall be bound thereby, anything in the Constitution or the laws of any State to the contrary notwithstanding."

When the corporation entered the State by authority of its laws, it was not, in the language of the Court in the Smelting Company case "a mere license to come into the State and do business therein upon payment of a sum named liable to be revoked or the sum increased at the pleasure of the State, without further limitations. It was a clear contract that the liability, etc. should be the same as the domestic corporation, and the same treatment should be measured out to both."

Such being the case, did the power retained by the State to alter, revoke or amend any charter of a corporation with the proviso "that no injustice should be done to the corporators" authorize the impairment of the obligations of a contract?

It is urged that when the corporation came into the State it knew that its charter could be revoked, as the Constitutional provision was as much a part of the statute authorizing it to enter the State as if included therein.

The framers of the Constitution, composed as it was of some of the ablest lawyers of the State of Arkansas, were, of course, familiar with the provisions of the Constitution of the United States and no doubt knew that to retain the power to revoke it absolutely, regardless of any contract rights of the parties, might be in violation of that instrument prohibiting the States from enacting laws impairing the obligations of contracts, and for this reason added the proviso "in such manner, however, that no injustice shall be done to the corporators."

The effect of such a Constitutional proviso was passed upon in Vicksburg *vs.* Water Works Co. 202 U. S. 453, distinguishing Hamilton Gas &c. Co. *vs.* City of Hamilton 146 U. S. 258. But even if it be assumed that the proviso has not that effect, still it cannot in any way affect the determination of this cause. The contract between the foreign corporation and the State, as declared in the American Smelting Company case, was "a clear contract that the liabilities etc. should be the same as the domestic corporations, and the same treatment should be measured out to both."

If it was desired to increase the liabilities of the foreign corporation, it could only be done by increasing those of the domestic corporations at the same time and to the same extent.

That the Act of 1907 deprived foreign corporations then doing business in the State under the Acts in force prior thereto of valuable rights and privileges of which domestic corporations are not deprived, and imposed on them onerous liabilities not imposed on domestic corporations, is too clear to require argument. Section one of the Act deprives them of the right, without the consent of the other party, to remove any suit or proceeding brought by any
40 one against it in any Court of the State to any Federal Court, or to institute any original suit or proceeding against any citizen of this State in any Federal Court, and as a penalty it forfeits its right to do business in the State. Corporations organized under the laws of the State are not deprived of this privilege or right. They may institute proceedings in the Federal Courts originally or remove such a cause if, under the Acts of Congress, there is authority to do so. This is a valuable right conferred by Congress in pursuance of the authority of the Constitution of the United States of which the States cannot deprive a citizen or a corporation. Insurance Co. *vs.* Moore, 20 Wallace, 425; Barron *vs.* Burnside, 121 U. S. 186; Sou. Pac. Ry. Co. *vs.* Denton, 146 U. S. 202; Martin *vs.* R. R. Co. 151 U. S. 673; Barrow Steamship Co. *vs.* Kane, 170 U. S. 100.

Section three of the Act requires all foreign corporations, although they have complied with the laws of the State when they entered the State, to pay again heavy incorporating fees, while domestic corporations chartered before the passage of the Act are not subject to this burden.

It is impossible to distinguish this case from American Smelting Co. *vs.* Colorado, and for this reason the demurrer to the bill must be overruled.

Endorsed: Filed October 5th, 1907. W. P. Feild, Clerk.

41 Which Prayer for Appeal and Assignment of Errors is as follows:

In the United States Circuit Court, Eastern District of Arkansas, Western Division.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas.

The defendant, Oswald C. Ludwig, prays an appeal to the Supreme Court of the United States from the decree entered in this cause at the October Term, 1907, and assigns the following errors:

1. The Court erred in holding that it had jurisdiction of this cause.

2. The Court erred in holding that by filing with the Secretary of State of Arkansas in September, 1887, an appointment of an

agent for the service of process upon it, and by filing on July 21st, 1905, with the Secretary of State of Arkansas an appointment of an agent for the service of process upon it, and a copy of its articles of incorporation, paying therefor a filing fee of One Hundred Dollars, and by making large investments within the State prior to the passage of the Act of 1905, under the Act of the State of Arkansas of March 31st, 1885, complainant acquired a vested right to continue its business in the State of Arkansas, so that it could not be required to pay the license fee exacted by the Act of the Legislature of the State of Arkansas, approved May 6th, 1905, and which is Act No. 261 of the Acts of Arkansas for the year 1905, and Act No. 373 of the Acts of Arkansas for the year 1907.

(Signed) W. F. KIRBY,
Attorney General.

Endorsed: Filed November 22nd, 1907. W. P. Feild, Clerk.

42 And on November 30th, 1907, the following proceedings were had, to-wit:

1460.

WESTERN UNION TELEGRAPH COMPANY
vs.
OSWALD C. LUDWIG, as Secretary of State of the State of Arkansas.

Comes the defendant, by W. F. Kirby, Attorney General of the State of Arkansas, and files herein his appeal bond in the sum of Three Hundred Dollars ($300.00) with E. L. McHaney as surety, which said bond is approved by the Judge of this Court as sufficient. Whereupon the said defendant files herein his citation to said complainant, with service thereof properly acknowledged thereon.

Which Appeal Bond is as follows:

Know all men by these presents, that we Oswald C. Ludwig, as principal and E. L. McHaney, as surety, are held and firmly bound unto the Western Union Telegraph Company in the full and just sum of Three Hundred Dollars ($300.00) to be paid to the said Western Union Telegraph Company, its certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 30th day of November, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at the October Term, 1907, of the United States Circuit Court for the Western Division of the Eastern District of Arkansas in a suit pending in said Court, between the Western Union Telegraph Company and Oswald C. Ludwig, as Secretary of State, a decree was rendered against the said Oswald C. Ludwig and the said Oswald C. Ludwig having obtained an appeal, and filed a copy thereof in the Clerk's Office of the said Court to reverse

43 the decree in the aforesaid suit, and a citation directed to the said Western Union Telegraph Company citing and admon-

ishing it to be and appear at a Supreme Court of the United States, at Washington within thirty days from the date thereof.

Now the condition of the above obligation is such, that if the said Oswald C. Ludwig shall prosecute said appeal to effect and answer all damages and cost if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

(Signed) OSWALD C. LUDWIG. [SEAL.]
E. L. McHANEY. [SEAL.]

Approved:
JACOB TRIEBER, *Judge.*

Endorsed: Filed November 30th, 1907. W. P. Feild, Clerk.

Which citation is as follows:

44 UNITED STATES OF AMERICA, *ss:*

To the Western Union Telegraph Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, wherein Oswald C. Ludwig, as Secretary of State of the State of Arkansas, is appellant and you are appellee, and show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Jacob Trieber, United States District Judge for the Eastern District of Arkansas, this 30th day of November, in the year of our Lord one thousand nine hundred and seven.

JACOB TRIEBER,
United States District Judge,
Eastern District of Arkansas.

Service of the above citation acknowledged this 30th day of November, 1907.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Solicitors for the Western Union Telegraph Co.

Endorsed: Filed November 30th, 1907. W. P. Feild, Clerk.

45 UNITED STATES OF AMERICA,
Western Division of the Eastern
District of Arkansas:

I, W. P. Feild, Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct and compared copies of the origi-

nals remaining of record in my office, and constitute a true copy of the record, the assignment of errors, and of all proceedings in the case of Western Union Telegraph Company *vs.* Oswald C. Ludwig, Secretary of State of the State of Arkansas.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this tenth day of December, in the year of our Lord, One Thousand Nine Hundred and seven, and of the Independence of the United States of America the one hundred and thirty-second.

[The seal of the Circuit Court of East. Dist. Ark., Western Division, U. S. A.]

Attest:

W. P. FEILD, *Clerk.*

Endorsed on cover: File No. 20,951. E. Arkansas C. C. U. S. Term No. 233. Oswald C. Ludwig, as Secretary of State of the State of Arkansas, appellant, *vs.* The Western Union Telegraph Company. Filed December 30th, 1907. File No. 20,951.

UNITED STATES SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,
Appellant,
vs.
P. R. ANDREWS, *et al.*,
Appellees.

October Term,
No. 146.

OSWALD C. LUDWIG, as Secretary of State of Arkansas,
Appellant,
vs.
WESTERN UNION TELEGRAPH CO.,
Appellee.

October Term,
No. 288.

Motion to Advance and Memorandum Brief in Support Thereof.

RUSH TAGGART,
HENRY D. ESTABROOK,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for W. U. TEL. CO.

Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY, Appellant, *vs.* P. R. ANDREWS, *et al.*, Appellees.	October Term, No. 146.
OSWALD C. LUDWIG, as Secretary of State of Arkansas, Appellant, *vs.* WESTERN UNION TELEGRAPH COMPANY, Appellee.	October Term, No. 233.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

The Western Union Telegraph Company, appellant in the above-entitled case of Western Union

Telegraph Company *v.* Andrews, *et al.*, Number 146 on the current docket of this Court, moves the Court to advance Number 233 above-mentioned and to set the same down for hearing with Number 146, upon the ground that both cases involve the same fundamental questions.

RUSH TAGGART,
HENRY D. ESTABROOK,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH
Attorneys for W. U. Tel. Co.

SUPREME COURT OF THE UNITED STATES.

WESTERN UNION TELEGRAPH COMPANY, Appellant, *vs.* P. R. ANDREWS, *et al.*, Appellees.	October Term, No. 146.
OSWALD C. LUDWIG, as Secretary of State of Arkansas, Appellant, *vs.* WESTERN UNION TELEGRAPH COMPANY, Appellee.	October Term, No. 233.

Memorandum Brief of Western Union Telegraph Company in Support of Motion to Advance Cause for Hearing.

Counsel for appellant in the above-entitled case of Western Union Telegraph Company *v.* Andrews, *et al.*, Number 146 on the current docket of this Court respectfully represent:

That the legislature of the State of Arkansas on or about the 13th day of May, 1907, passed an act entitled, "An Act to permit foreign corporations to do business in the State of Arkansas and fixing fees to be paid by all corporations," under the provisions of which statute it was sought to tax the Western Union Telegraph Company a percentage of its entire capital stock of one hundred million dollars for the privilege of continuing to do any business in said state (such license fee amounting to the sum of twenty-five thousand dollars), notwithstanding the Telegraph Company was engaged in interstate commerce and was an agency of the United States Government and denouncing heavy penalties against said Telegraph Company for failure to pay said fee and making it a duty of said Andrews and other co-defendants, as prosecuting attorneys for the different counties in said State of Arkansas, to institute suits in the name of the State for any violations of said act and further making it the duty of said Ludwig, as Secretary of State, to withhold the consent of the State and to refuse to said Telegraph Company the right to file and record an authenticated copy of a statement of its assets and liabilities and the amount of capital employed in the State, the name of an agent upon whom process may be served, etc., until such fee of Twenty-five Thousand Dollars had been paid; whereupon the Telegraph Company brought its suit in the Circuit Court for the Eastern District of Arkansas, Western Division, to enjoin the said Andrews and his co-defendants, as prosecuting attorneys for the

different counties, and to restrain and enjoin them and each of them from attempting to collect the said fee of Twenty-five Thousand Dollars and from attempting to enforce any penalties alleged to have accrued under and by virtue of the provisions of said statute on the ground that said statute was void for the various reasons set forth in the bill filed by said Telegraph Company in said suit; and at the same time, and in the same Court, the Telegraph Company brought suit against the said Ludwig, as Secretary of the State of Arkansas, to enjoin said Ludwig from performing the duties specially devolved upon him under said act in enforcing the penalties prescribed in said act against said Telegraph Company for reasons identical with those set forth in the bill of the Telegraph Company against said Andrews and others.

And counsel for the Telegraph Company represent that in each of these cases, brought in the same court, a general demurrer to the bill was filed and they were argued together in the trial Court whereupon it was determined by that court that the said Ludwig, Secretary of State, be enjoined as prayed by the bill on the ground that the Arkansas statute aforesaid violated the terms of a contract theretofore entered into between the Telegraph Company and said State of Arkansas, but dismissed complainant's bill against said Andrews and others on the ground that suit against them as prosecuting attorneys of the State was in substance a suit against the State itself, of which the federal courts had no jurisdiction; but nevertheless permitted the said Telegraph Company to supersede said order of dis-

missal in order that the point ruled upon might be presented to this Honorable Court in connection with the argument of the principal questions involved in the Ludwig case. In No. 146 the Telegraph Company appeals from the decree of the Trial Court dismissing its bill as without jurisdiction. In No. 233 the Secretary of State appeals from the decree of the Court enjoining him from enforcing the provisions of the statute of Arkansas.

Counsel further represent that said causes can be argued as one cause in the time allotted by the rules to one cause, and that the Attorney General of the State of Arkansas seeks to uphold the validity of the Statute of Arkansas in both cases.

Counsel therefore suggest that these cases, involving the same fundamental questions, should properly be argued at the same time, and that No. 233 on this calendar should accordingly be advanced and set for hearing with No. 146.

Respectfully,

Rush Taggart,

Henry D. Estabrook,

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH

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Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 148. 8

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

vs.

P. R. ANDREWS, CLYDE GOING, R. E. JEFFREY ET AL.,
Appellees.

Motion to Advance and Memorandum Brief in Support of Motion.

RUSH TAGGART,
HENRY D. ESTABROOK,
Attorneys for Appellant.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellant,

AGAINST

P. R. ANDREWS, CLYDE GOING, R. E. JEFFREY, ET AL.,
Appellees.

October Term.
No. 146.

Appeal From the Circuit Court of the United States for the Eastern District of Arkansas.

The Western Union Telegraph Company, appellant, in the above entitled cause, moves the Court to advance the same for hearing and to set the same down for hearing, with No. 118, The Western Union Telegraph Company, Plaintiff in Error, against the State of Kansas, *ex. rel.* C. C. Coleman, Attorney General, on the ground that the same questions are involved in No. 118, and in this cause.

RUSH TAGGART,
HENRY D. ESTABROOK,
Attorneys for Appellant.

SUPREME COURT OF THE UNITED STATES.

THE WESTERN UNION TELEGRAPH COMPANY, Appellant, AGAINST P. R. ANDREWS, CLYDE GOING, R. E. JEFFRFY ET AL.	October Term. No. 146.

The counsel for the appellant in the above entitled cause, in support of its motion for the advancement of this cause to be heard with No. 118, respectfully represent that in action No. 118 the Supreme Court of the State of Kansas has interpreted the statutes of Kansas as authorizing a license tax against The Western Union Telegraph Company for the privilege of doing a purely intrastate business in said state, based upon its entire capital, $100,000,000, notwithstanding that of such capital there is employed in the State of Kansas but a small fraction, and that upon the refusal of the Telegraph Company to pay such tax it was, by judgment of the Supreme Court of Kansas, ousted of its right to do a local business in said state, notwithstanding it has been engaged in such business for many years, prior to the beginning of said proceeding. The Telegraph Company will present to this court for consideration as one of the questions involved in this case whether or not, under the conceded facts in the case, the action of the legislature of Kansas is not a violation of the contract between it and the State of Kansas and in violation of its rights, secured to it by the 14th Amendment of the Constitution of the United States, in that such legislation denies to it the equal protection of the laws, and does not accord to it the due process of all that is secured to it by said amendment to the Constitution.

In the case at bar, The Western Union Telegraph Company constructed its lines within the State of Arkansas, under

legislation of the state, authorizing such construction, and operated and maintained the same for many years for domestic, interstate and govermental business and thereafter the State Legislature enacted legislation forbidding the appellee to transact any business within the said state of Arkansas, unless and until it should have paid a large sum to said state based upon a percentage of its entire capital stock as a condition of its right to do business within said state, which action of the said State of Arkansas is claimed by the appellee to be in violation of the contract between the appellee and the said State of Arkansas, and in violation of the provisions of the 14th Amendment to the Constitution of the United States, in that it deprives the appellee of its property without due process of law, and does not accord to the appellee the equal protection of the laws to which it is entitled under said amendment. That there is presented thus, as the fundamental questions in this cause, the same questions that underlie, and will be argued in No. 118, the case of The Western Union Telegraph Company, plaintiff in error, against the State of Kansas, on the relation of C. C. Coleman, Attorney General. That said causes should properly be argued at the same time. That Cause No. 233, on the Calendar of this Court in which a similar motion is made requires a consideration of the same legislation of the State of Arkansas.

Respectfully,
RUSH TAGGART,
HENRY D. ESTABROOK,
Attorneys for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 232. 45

OSWALD C. LUDWIG, as Secretary of State of Arkansas,
Appellant,

vs.

THE WESTERN UNION TELEGRAPH COMPANY,
Appellee.

Motion to Advance and Memorandum Brief in Support of Motion to Advance.

RUSH TAGGART,
HENRY D. ESTABROOK,
Attorneys for Appellee.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States.

OSWALD C. LUDWIG, as Secretary of the State of Arkansas, Appellant, AGAINST THE WESTERN UNION TELEGRAPH COMPANY, Appellee.	October Term. No. 233.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

The Western Union Telegraph Company, appellee, in the above entitled cause, moves the Court to advance the same for hearing and to set the same down for hearing with No. 118, the Western Union Telegraph Company, Plaintiff in Error, against the State of Kansas *ex rel.* C. C. Coleman, Attorney General, upon the ground that same questions are involved in No. 118 and in this cause.

RUSH TAGGART,
HENRY D. ESTABROOK,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

OSWALD C. LUDWIG, as Secretary of the State of Arkansas, Appellant, AGAINST THE WESTERN UNION TELEGRAPH COMPANY, Appellee.	October Term. No. 233.

Memorandum Brief of Appellee in Support of Motion to Advance Cause for Hearing.

The counsel for the appellee in the above entitled cause respectfully represent that in action No. 118, the Supreme Court of the State of Kansas has interpreted the statutes of Kansas as authorizing a license tax to be levied against the Western Union Telegraph Company for the privilege of doing a purely intrastate business in said state based upon its entire capital, One hundred million dollars, notwithstanding that of such capital there is employed in the State of Kansas, but a small fraction, and that upon the refusal of the Telegraph Company to pay such tax, it was, by the judgment of the Supreme Court of Kansas, ousted of its right to do a local business in said state, notwithstanding it has been engaged in such business for many years, prior to the beginning of said proceeding. The Telegraph Company will present to this court for consideration as one of the questions involved in this case whether or not, under the conceded facts in the case, the action of the Legislature of Kansas is not a violation of the contract between it and the State of Kansas and in violation of its rights, secured to it by the 14th Amendment of the Constitution of the United States, in that such legislation denies to it the equal protection of the laws, and does not accord to it the due process of law secured to it by such amendment to the Constitution.

In the case at bar, The Western Union Telegraph Company constructed its lines within the State of Arkansas, under legislation of the state, authorizing such construction, and operated and maintained the same for many years for domestic, interstate and governmental business, and thereafter the State Legislature enacted legislation forbidding the appellee to transact any business within the said state, unless and until it should have paid a large sum to said State, based upon a percentage of its entire capital stock, as a condition of its right to do business within said state, which action of the said State of Arkansas is claimed by the appellee to be in violation of the contract between the appellee and the said State of Arkansas, and in violation of the provisions of the 14th Amendment to the Constitution of the United States, in that it deprives the appellee of its property without due process of law, and does not accord to the appellee the equal protection of the laws to which it is entitled under said amendment. That there is presented thus, as the fundamental questions in this cause, the same questions that underlie, and will be argued in No. 118, the case of The Western Union Telegraph Company, plaintiff in error, against the State of Kansas, upon relation of C. C. Coleman, Attorney General. That said causes should properly be argued at the same time. That No. 146 on this calendar in which a similar motion is made, requires a consideration of the same legislation of the State of Arkansas.

Respectfully,

RUSH TAGGART,

HENRY D. ESTABROOK,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

WESTERN UNION TELEGRAPH COMPANY,
Appellant,
vs.
P. R. ANDREWS ET AL.,
Appellees;
AND
O. C. LUDWIG, Secretary of State,
Appellant,
vs.
WESTERN UNION TELEGRAPH COMPANY,
Appellee.

No. 146.

No. 233.

BRIEF FOR THE WESTERN UNION TELEGRAPH COMPANY.

RUSH TAGGART,
HENRY D. ESTABROOK,
GEORGE B. ROSE,
Counsel for Western Union Telegraph Company.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

In the Supreme Court of the United States.

WESTERN UNION TELEGRAPH COMPANY

vs. No. 146.

P. R. ANDREWS ET AL.

AND

O. C. LUDWIG, Secretary of State,

vs. No. 233.

WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR WESTERN UNION TELEGRAPH COMPANY.

Statement.

These two cases were brought to test the constitutionality of the following statute passed by the legislature of the State of Arkansas, and approved May 13th, 1907:

"Be it Enacted by the General Assembly of the State of Arkansas:

"SECTION 1. Every company and corporation incorporated under the laws of any other State, territory, or country, including foreign railroad and foreign fire

and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with the statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served. *Provided*, before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its Board of Directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the Company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal Court, or shall institute any suit or proceeding against any citizen of this State in any Federal Court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation.

"SECTION 2. Any foreign corporation which shall fail to comply with the provisions of this Act, and shall do any business in this State, shall be subject to a fine of not less than $1,000, to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the county in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered, and as an additional

penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make any contract in this State which can be enforcedby it either in law or in equity, and the complying with the provisions of this Act after suit is instituted shall in no way validate said contract.

" SECTION 3. That all corporations hereafter incorporated in this State and all foreign corporations seeking to do business in this State shall pay into the treasury of this State for the filing of said articles a fee of $25.00 where the capital stock is $50,000.00 or under ; $75.00 where the capital stock is over $50,000.00 and not more than $100,000.00 ; and $25.00 additional for each $100,000.00 of capital stock.

" Any foreign mutual corporation having no capital stock shall be required to pay to the Secretary of State for filing its articles of incorporation the sum of $500.00. *Provided, however,* nothing in this section shall apply to fraternal orders that write insurance.

" SECTION 4. That Act 185, approved April 17, 1907, and entitled, 'An Act to provide a manner in which foreign corporations may become domestic corporations and for other purposes,' and all laws and parts of laws in conflict herewith be, and the same are, hereby repealed ; and that this Act take effect and be in force from and after its passage."

The fees which the appellant would have to pay under the act as a condition of continuing its business in the State would be $25,050.

The first suit was brought against the prosecuting officers charged by the act with the duty of enforcing its provisions, to restrain them from the institution of proceedings against the company, and the second suit was brought against the Secretary of State to restrain him from revoking the company's privilege of doing business in the State on account of its refusal to pay the fees demanded.

In the first suit a motion to dismiss on account of a want of jurisdiction was sustained, and in the second suit an injunction was awarded restraining the Secretary of State from revoking appellant's license.

Both cases come up upon the face of the bills. The

allegations in each bill are in substance that the complainant was organized under the laws of New York in 1848; that it accepted the terms of the Act of Congress of July 24th, 1866, entitled, "An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military and other purposes", and that in pursuance of the terms of said act it has been serving the Government in a postal capacity, transmitting its messages all over the world, and within the State of Arkansas; that the company has over 900,000 miles of wire, over 23,000 offices, and transmits yearly 65,000 messages between all parts of the United States and also to and from foreign countries, and that prior to the passage of the act above quoted it had expended $153,000 in the construction of lines in the State of Arkansas, largely upon the post roads of the Government, and these lines are used within the State and without it for the messages of the Government; that if said lines cannot be used for the transmission of messages, their value is destroyed, as they would scarcely be worth the expense of moving them; that the complainant's gross income from intrastate business in Arkansas is about $32,000 a year and the expense of conducting the same about $20,000 a year, and that it pays the State of Arkansas about $12,000 in taxes; that complainant entered the State with its consent some forty years ago, and has continually extended its system in the State with its consent; that the State has recognized its right to do business, and passed various laws regulating its conduct, and on the faith of such knowledge and acquiescence on the part of the State, the complainant has made the expenditure of $153,000 above referred to; that it has tendered its articles of incorporation to the Secretary of State, together with all papers and documents required by the act, but the Secretary of State refused to permit their filing unless complainant paid the sum of $25,050.00, aforesaid. The bill also shows that the complainant has complied

with the following statute of the State of Arkansas, which became a law on the 16th of February, 1899:

"Every corporation formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this state, or to continue business therein, if already established, shall by its certificate, under the hand of the president and seal of such company or corporation, filed in the office of the secretary of state of this state designate an agent, who shall be a citizen of this state, upon whom service of summons and other process may be made. Such certificate shall also state the principal place of business of such corporation in this state. Any corporation so filing such certificate in the office of the secretary of state shall pay therefor a fee of one dollar for such filing, and a like fee for each subsequent appointment of an agent so filed.

"Every company or corporation incorporated under the laws of any other state, territory or country, now or hereafter doing business in this state, shall file in the office of the secretary of state of this state a copy of its charter, or articles of incorporation, or association, or in case such company or corporation is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly authenticated, and certified by the proper authority, and pay into the treasury of the state incorporating and other fees equal to those required of similar corporations formed within and under the laws of this state.

"The secretary of state shall then cause all such charters, articles of incorporation, or association, so filed to be duly recorded in a book kept for that purpose, and shall cause to be issued to said corporation a copy of such charter, or articles of incorporation, or certificate so filed, properly certified under the seal of his office, and a copy of such charter, or articles of incorporation or certificate, certified to by the secretary of state shall be taken by all the courts of this state as evidence that the said corporation has complied with the provisions of this act, and is entitled to all the rights and benefits therein conferred.

"And such corporation shall be entitled to all the rights and privileges, and subject to all the penalties conferred and imposed by the laws of this state upon similar corporations formed and existing under the laws of this state; provided, that the provisions of this act requiring copy of original articles of incor-

poration or charter, and certificate naming an agent, and to pay certain fees therefor, shall not apply to railroad companies which have heretofore built their lines of railroad into or through this state; provided, further, that the provisions of this act are not intended and shall not apply to 'drummers' or traveling salesmen soliciting business in this state for foreign corporations which are entirely non-resident.

"Any foreign corporation as defined above, which shall refuse or fail to comply with this act, shall be subject to a fine of not less than one thousand dollars, to be recovered before any court of competent jurisdiction; and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause shall accrue.

"If any such foreign corporation shall fail to comply with the provisions of section 825, all its contracts with citizens of this state shall be void as to the corporation, and no court of this state shall enforce the same in favor of the corporation.

"No foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand whether arising out of contract or tort.

"Corporations doing business in the state were given ninety days in which to comply with this act."

Kirby's Dig. Ark. Statutes, ch. Secs. 825, *et seq.*

ARGUMENT.

I.

The Court below erred in holding that it was without jurisdiction in the first suit.

The court dismissed the first suit on the ground that it had no jurisdiction to enjoin the prosecuting officers from the institution of proceedings under the act.

The decisions in *Ex Parte* Young, 209 U. S., 124, and Hunter vs. Wood, 209 U. S., 205, establish beyond all question the jurisdiction of the court. The act charges the defendants with the duty of enforcing its provisions and offers them as an inducement to greater activity one-fourth of all the enormous fines which it imposes. If therefore the act is unconstitutional as applied to the appellant, it directs the defendants to commit a plain trespass against appellant's rights. These decisions are so obviously correct that they have met with universal approbation. These cases preclude the necessity of a reference to the numerous cases which have led up to them and rendered them inevitable. In justice to the trial court it should be noted that both the foregoing cases were decided by this court after the decree of dismissal herein when the rule of law was concededly uncertain.

II.

By Discriminating Between Foreign and Domestic Corporations, the Statute Complained of Denies to the Telegraph Company the Equal Protection of the Law.

It is, of course, too well settled to admit of argument that a State may, if it sees fit to do so, exclude

from its territory any foreign corporation not engaged in interstate commerce or in the service of the United States. But it is equally well settled that if the State does admit the corporation within its borders, it is then a person entitled to the protection afforded by the Fourteenth Amendment, and if the corporation enters the borders of a State with the State's permission and makes investments therein, it must be protected in the enjoyment of its property to the same extent as an individual (Blake vs. McClung, 172 U. S., 239). There are many corporations, such as insurance companies, whose business demands no permanent investment within the borders of a State, and which therefore remain at the mercy of the State Legislature. A telegraph company, however, can carry on its business only through a system of lines and offices, which are permanent in their nature, and whose erection and establishment demand a large expenditure. When the State admits such companies within its territory it does so with the understanding that they will erect their poles, stretch their wires and establish their offices. It does so knowing that on the faith of the license granted, large sums of money will be invested, and that this investment will be protected by the provisions of the Federal Constitution.

In the case of the *American Smelting Company vs. Colorado, ex rel.* LINDSLEY, *204 U. S., 103*, it was decided that when foreign corporations have entered a State with its permission, and made permanent investments therein, they can not be discriminated against in favor of domestic corporations. To do so would be to deny them the equal protection of the law.

Now it will be observed that this act discriminates in favor of domestic corporations in several ways. In the first place, domestic corporations, which have already been incorporated, pay no fees, while a foreign corporation which has complied with the statutes, entered the State and made permanent investments, must pay fees, amounting, in the case of this telegraph company, to $25,050.

In the second place, domestic corporations are subjected to no penalty for a failure to comply with the terms of the act, while foreign corporations must pay a fine of one thousand dollars for each day that they do business without complying with the act, and all of their contracts are forfeited.

In the third place, the act forbids a foreign corporation to bring suit in the United States Courts, and forfeits its right to do business in the State in the event of its instituting such an action, while it contains no restriction upon the right of domestic corporations to sue in those courts.

This is a valuable right conferred by Congress, in pursuance of the authority of the Constitution of the United States, of which the State cannot deprive a citizen or a corporation.

Ins. Co. vs. Moore, 20 Wallace, 425.
Barron vs. Burnside, 121 U. S., 180.
So. Pac. Ry. Co. vs. Denton, 146 U. S., 200.
Martin vs. R. R. Co., 151 U. S., 673.
Barrow SS. Co. vs. Kane, 170 U. S., 100.

As was said by MR. JUSTICE FIELD in *Yick Wo. vs. Hopkins*, 118 U. S., 369, in language that has often been quoted with approval,

"The equal protection of the law is a pledge of the protection of equal laws."

Is this law equal in its operation? To be equal, the exaction would have to be uniform on all companies, or else based on the amount of business done by each within the State. The State can not select one corporation, and because it happens to have a large capital invested in other States, compel it to pay an exoribitant sum for the privilege of continuing business within its confines, while it permits other companies to do a similar business at a lower rate.

It may be that under the decision in *Paul vs. Virginia* a State may on any ground, however capricious, refuse admission to a foreign corporation not engaged in interstate commerce nor in the government service;

but when it has admitted the corporation to do business within its borders and has encouraged it to invest there large sums of money in the erection of an expensive plant, then it cannot turn upon it and say, "If you do not pay whatever we demand, you must get out of our territory and lose all that you have invested." To such an attempt the courts must reply, "This corporation, which is not a citizen within the provision guaranteeing to the citizens of each States all the rights and immunities of citizens of other States, is nevertheless a person within the meaning of the Fourteenth Amendment, and as such is entitled to security in its property and to equality of rights before the law." Any other position gives to the State the power to confiscate the property of the corporation within its limits. If it can lay upon such corporations an imposition of twenty-five thousand dollars in addition to the regular taxes, which they pay equally with everyone else, it can impose upon them one hundred thousand or half a million of dollars, and so wipe out entirely their investment. And it is no answer to this to say that if the company does not want to pay the license fee it has only to get out. That will do for an insurance company, which has no property in the State; but a telegraph company has an extensive plant, consisting of poles fixed in the ground and wires strung upon them, which are almost worthless if removed.

As is said in CLARK and MARSHALL on *Private Corporations*, Vol. 3, Sec. 845, p. 2704:

"The provision of the federal constitution that no state shall deny to any person within its jurisdiction the equal protection of its laws does not prevent a state from excluding foreign corporations altogether, or from imposing any conditions it may see fit before allowing them to come into the state; for a foreign corporation can only be entitled to the benefit of this provision after it has come within the jurisdiction of the state. A corporation is a person, however, within the meaning of this provision, and, after a state has admitted a foreign corporation within its jurisdiction, the provision will protect it."

The decision in *American Smelting Company vs. Colorado* (cited *ante*, p. 8) is so recent that we have not been able to find that it has been applied in any case except the *Chicago, Rock Island & Pacific Railroad Company vs. Swanger*, 157 Fed., 783, where the Circuit Court for the Western Division of Missouri applied it to a case similar to that now before the court, holding the legislative act to be unconstitutional.

III.

The Act Violates the Contract Between the State and the Telegraph Company and Deprives the Latter of its Property Without Due Process of Law.

On the 31st of March, 1885, the legislature of Arkansas passed a statute which appears on page 176 of the Acts of that year, and the material portions of it are as follows:

"SEC. 1. That any person or corporation organized by virtue of the laws of this State, or of any other State of the United States, or by virtue of the laws of the United States, for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence, the equivalent thereof, which may be hereafter invented or discovered, may construct, operate and maintain such telegraph, telephone or other lines necessary for the speedy transmission of intelligence along and over the public highways and streets of the cities and towns of this State, or across and under the waters and over any lands or public works belonging to this State, and on and over the lands of private individuals, and upon, along, and parallel to any of the railroads or turnpikes of this State, and on and over the bridges, trestles or structures of said railroads; Provided, that the ordi-

nary use of such public highways, streets, works, railroads, bridges, trestles or structures and turnpikes be not thereby obstructed, or the navigation of said waters impeded, and that just damages shall be paid to the owners of such lands, railroads and turnpikes, by reason of the occupation of said lands, railroads and turnpikes, by said telegraph or telephone corporations.

"SEC. 2. That in the event such telegraph or telephone companies should fail, upon application to such individuals, railroads or turnpike companies, to secure such right of way, by consent, contract or agreement, then such telegraph or telephone corporations shall have the right to proceed to procure the condemnation of such property, lands, rights, privileges and easements in the manner prescribed by law for taking private property for right of way for railroads, as provided by sections five thousand, four hundred and fifty-eight (5458) to section five thousand, four hundred and sixty-seven (5467), both inclusive, of the Revised Statutes of Arkansas eighteen hundred and eighty-four (1884).

"SEC. 3. That wherever any such telegraph or telephone company shall desire to construct its lines on or along the lands of individuals, or on the right of way and structures of any railroad, or upon and along any turnpike, the said telegraph or telephone company may, by its agents, have the right to peacefully enter upon such lands, structures or right of way, and survey, locate and lay out its said lines thereon, being liable, however, for any damage that may result by reason of such acts.

"SEC. 5. *In consideration of the right of way over the public property herein conceded, every telegraph or telephone corporation shall, in the case of war, insurrection or civil commotion of any kind, and for the arrest of criminals, give immediate dispatch at the usual rates of charge to any message connected therewith of any officer of the State or of the United States.*

"SEC. 6. Any officer or agent of a telegraph or telephone company who fails or refuses to carry out the provisions of the preceding section is guilty of a misdemeanor.

"SEC. 7. All other messages, including those received from other telegraph or telephone companies, shall be transmitted in order of their delivery, correctly and without unreasonable delay, and shall be strictly confidential: Provided, however, that arrange-

ments may be made with the publishers of newspapers for the transmission of intelligence of general and public interest."

The idea seems to have gotten abroad that a foreign corporation has no rights which a State is bound to respect. It is true that the State may, for any reason, however capricious, prohibit certain foreign corporations from entering its borders; but the doctrine of *Paul vs. Virginia* has nothing to do with the question of contract. The State may make a contract with a foreign corporation as well as with a domestic one. Any legislation upon the part of the State and action upon the faith of it by the corporation, which will constitute a contract as between the State and a domestic corporation, will have precisely the same effect as between the State and a foreign corporation; and the contract so originating is equally sacred. The State said to the telegraph company, "If you will give precedence to my messages, you may build your lines upon my public highways and you may exercise my right of eminent domain." While this offer was still open, the company acted upon it, built many miles of telegraph lines which are of great value to the State and its citizens and which it cannot remove without an almost total loss. Now that it has made this expenditure upon the faith of the contract, the State says to it: "Unless you pay me $25,050.00 you must get out and abandon your entire investment within my borders." And of course if it can demand $25,050.00, it can demand $200,000.00, and entirely confiscate the company's property within its reach. The authorities to which we refer make it perfectly plain that if this were a domestic corporation which had acted upon the grant of the State, it would have acquired contractual rights which the State could not impair; and we have yet to learn that the language and conduct which constitute a contract with a corporation of the State will fail to constitute a contract with a corporation of another State. Contractual rights and

obligations know no State lines, and are circumscribed by no territorial boundaries.

The bill alleges that the company has availed itself of the provisions of this Act; that it has expended large sums in the construction of telegraph lines thereunder, and that it has held itself in readiness to perform the requirements of section 5 of said Act, and has performed them whenever called upon.

The decision in the case of *United States vs. Central Pacific Railroad Co.*, 118 U. S., 235, establishes conclusively the rights of the telegraph company under this act. There it appeared that the Central Pacific Railroad Co. had been built under a statute granting it certain privileges in consideration of its giving to the transmission of government telegrams, and to the transportation of mules, troops and munitions of war a preference; and this was held to constitute a contract. After quoting the statute, the court say:

"These sections, taken together, constitute the contract between the United States and the appellee. *United States vs. Union Pacific Railroad Co., 91 U. S., 72; Sinking Fund Cases, 99 U. S., 700, 718; Union Pacific Railroad Co. vs. United States, 104 U. S., 662.* This contract is binding on the United States, and they can not, without the consent of the company, change its terms by any subsequent legislation. *Sinking Fund Cases, ubi supra.*"

In the case of *St. Louis vs. Western Union Tel. Co.*, 148 U. S., 103, the court approved the decision of the Supreme Court of Louisiana in the case of *New Orleans vs. Southern Telephone and Telegraph Co.*, 40 La. Ann., 41, saying:

"In that case it appeared that the telephone company had set its poles and constructed its lines under and by virtue of the grant made by the ordinance, and hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard. As stated in the opinion, page 45: 'Obviously, upon the

clearest considerations of law and justice, the grant of authority to defendant when accepted and acted upon, became an irrevocable contract, and the city is powerless to set it aside or to interpolate new and more onerous considerations therein. Such has been the well-recognized doctrine of the authorities since the *Darmouth College Case, 4 Wheat, 518.*' The same principle controlled the cases of *Commonwealth v. New Bedford Bridge, 2 Gray, 339; Kansas City v. Corrigan, 86 Missouri, 67; Chicago v. Sheldon, 9 Wall., 50.*"

In *Monongahela Co. vs. U. S.*, 148 U. S. 329, the State of Pennsylvania had granted to the Navigation Company the right to improve a river and to take tolls thereon. The United States undertook to condemn the property of the company and to pay therefor only the actual value of the property itself; but it was held that when the Company made the improvements under the statute a contract arose between the Company and the State, and that the franchise so created was a thing of value for which the government must make compensation. In that case the court quoted with approval on page 329, the following language used in *Montgomery County vs. Bridge Co.*, 110 Pa. St., 54, 68:

"'The bridge structure, the stone, iron and wood, was but a portion of the property owned by the bridge company, and taken by the county. There were also the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of its franchises. The latter can no more be taken without compensation than can its tangible corporeal property. Their value necessarily depends upon their productiveness. If they yield no money in return over expenditures, they would possess little, if any, present value. If, however, they yield a revenue over and above expenses, they possess a present value, the amount of which depends, in a measure, upon the excess of revenue. Hence it is manifest that the income from the bridge was a necessary and proper subject of inquiry before the jury'"

In *Walla Walla vs. Walla Walla Water Co.*, 172 U. S., 1, it was held that where the water company, under a franchise, made valuable improvements, its action constituted a contract, the court saying, on page 9:

"It is sufficient for the purposes of this case to say that this court has too often decided for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against state legislation to impair it."

In *Pearsal vs. Great Northern Railway Co.*, 161 U. S., 661, the court say:

"Subsequent cases have settled the law that, wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation."

Even if no new investment had been made under the statute, the mere act of the company in continuing to operate its lines thereunder would have given it contractual rights, as is settled in *City Railway Co. vs. Citizens Railroad Co.*, 166 U. S., 587, where the court say:

"The original ordinance of January 18, 1864, was plainly a proposition on the part of the city to grant to the company the use of its streets for thirty years, in consideration that the company lay its tracks and operate a railway thereon upon certain conditions prescribed by the ordinance. This proposition, when accepted by the company and the road built and operated as specified, became a contract which the State was not at liberty to impair during its continuance; but if, at the expiration of thirty years, the road had been sold to another company, and that company had applied for and obtained from the common council a franchise

to occupy its streets for another period, it seems to be clear that such a contract would need no other consideration to support it than the continued operation of the road under such conditions as the city chose to impose. But this is practically such a case, since it makes no difference in principle whether the road passes into the hands of a new company or is retained by the old one, or whether the extension is granted at the time of or before the original franchise expired. In either case the consideration, viz.: the continued operation of the road, is the same. If, instead of extending the original ordinance, this ordinance had been surrendered by the company, and a new one had been enacted by which the franchise was extended, it would hardly be contended that the continued operation of the road would not be a sufficient consideration for the new ordinance. This was, in reality, part of the consideration upon which the original franchise was granted, and is, we think, a valuable consideration within the meaning of the law, and sufficient to support the extension."

In *Powers vs. Detroit & Grand Haven Railway Co.*, 201 U. S., 544, the court held :

" Provisions in a state statute for a special rate of taxation in respect to a particular corporation, made with a view of inducing large expenditures and the completion of an unfinished road of great public importance, and which are formally accepted and complied with, amount to a contract within the protection of the impairment clause of the Federal Constitution, and no other tax can be imposed on the corporation."

The fact that no money was paid to the State does not make the contract void for want of consideration. As was said by Chief Justice MARSHALL, in *Dartmouth College vs. Woodward, 4 Wheat., 637 :*

" The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and in most cases, the sole consideration of the grant."

We do not see why the decision in the case of *Erie Railroad Co. vs. Pennsylvania*, 153 U. S., 628, is not

conclusive upon this case. The Erie Railroad was built through Pennsylvania under the acts of 1841 and 1846. In 1885 the legislature of Pennsylvania passed a law requiring the railroad to deduct from the interest due on its bonds the taxes owed thereon by citizens of Pennsylvania, and to pay the same into the state treasury; and the court held that the company accepted the terms of the acts of 1841 and 1846 by building its railroad in pursuance thereof, and that it acquired contract rights with the state which it could not impair. Justice HARLAN said, on page 641, *et seq.*:

"The fundamental propositions upon which the argument of counsel for the State is based are that the New York, Lake Erie and Western Railroad Company is a private corporation of another State; that it has no right to do business in Pennsylvania without the permission of that State, and that it is, therefore, subject at all times to such reasonable regulations as may be prescribed by Pennsylvania, whether those regulations relate to taxation or to the business or property of the company in that Commonwealth. This view was expressed by the Supreme Court of Pennsylvania in *Commonwealth vs. New York, Lake Erie & Western, Railroad* 129 Penn. St., 463, 476, in the following language: "It was competent for the legislature of Pennsylvania to impose as a condition upon foreign corporations doing business in this State that they shall assess and collect the tax upon that portion of their loans in the hands of individuals resident within this State, and otherwise comply with the provisions of the act of 1885. The act imposes no tax upon the company; it simply defines a duty to be performed, and fixes a penalty for disregard of that duty. The legislature having so provided, compliance with the act may, in some sense, be said to form one of the conditions upon which corporations may do business within the State, and the corporation continuing its business subsequently would be taken to have assented thereto. There is, however, a condition implied even in the case of domestic corporations that they will be subject to such reasonable regulations, in respect to the general conduct of their affairs, as the legislature may from time to time prescribe, and such as do not materially interfere with

or obstruct the substantial enjoyment of the privileges the State has granted. *Chicago Life Ins. Co. vs. Needles*, 113 U. S., 574. If this be so as to corporations who are entitled to their charter privileges upon the footing of a contract, how much the more is it so as to corporations who are merely permitted by the legislature to do business within this State as a matter of grace and not of right?' '

* * * * * *

"Assuming, for the purpose of this case, the correctness of the position taken by the learned attorney general of Pennsylvania that the commerce clause of the Constitution of the United States has no bearing upon the present inquiry, we are of opinion that the fourth section of the act of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania, as disclosed by the acts of 1841 and 1846, and by what was done by that company upon the faith of those acts. Those acts prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. * * * There is no claim in the present case of any violation by the railroad company of the provisions of the acts of 1841 and 1846 specifying the terms and conditions upon which it acquired the right, so far as it depended upon state legislation, to enter Pennsylvania and construct and operate a part of its road within the territory of the Commonwealth. Consistently with those terms and conditions, Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the State, in the exercise of its police powers, for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situated within its limits.

"The argument in behalf of the State leads, logically, to the conclusion that notwithstanding the provisions of the acts of 1841 and 1846, prescribing the terms upon which the company acquired the privilege of constructing and operating its road in that State, Pennsylvania could, in its discretion, change those terms and impose any others it deemed proper. If the State amended those acts so as to increase the

sum to be paid annually into the state treasury as a bonus, from ten thousand to one hundred thousand dollars, the argument made by its attorney general would sustain such legislation upon the ground that the State, at the outset, could have exacted the larger amount from the company as a condition of the entering the State with its road. To any view which assumes that the State could—so long, at least as the railroad company performed the conditions of the acts of 1841 and 1846—burden the company with conditions that would substantially impair the right to maintain and operate its road within Pennsylvania upon the terms stipulated in those acts, we cannot give our assent. No such terms as those named in the act of 1885 were imposed prior to the building of the road in Pennsylvania, and the road having been constructed in that State upon the faith of the legislation of 1841 and 1846, and with the assent of the State given for a valuable consideration paid by the company, its maintenance in Pennsylvania cannot be made the pretext for imposing such conditions as those prescribed in the act of 1885."

IV.

The Act Infringes the Rights Conferred on the Telegraph Company of the Act of Congress of July 24th, 1866, as an Agency of the United States Government and as an Instrumentality of Commerce.

The Act of 1866 is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any telegraph company now organized, or which may hereafter be organized under the laws of any State in this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or

may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States. Provided, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of such companies shall have the right to take and use from such public lands the necessary stone, timber and other materials for its posts, piers, stations and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other.

"SEC. 2. And be it further enacted, That telegraphic communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"SEC. 3. And be it further enacted, That the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association or person; Provided, however, The United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military or other purposes, purchase all the telegraph lines, property and effects of any or all of said companies at an appraised value, to be ascertained by five competent, disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested and one by the four so previously elected.

"SEC. 4. And be it further enacted, That before any telegraph company shall exercise any of the powers of privileges conferred by this act such company shall file their written acceptance with the Postmaster-General of the restrictions and obligations required by this act."

The bill alleges the acceptance of the provisions of this act by the Telegraph Company on or about the 8th day of June, 1867, and the construction and own-

ership of a system of telegraph lines of the telegraph company, consisting of over 192,000 miles of poles and cables, and of over 900,000 miles of wire in all the states of the United States and the territories thereof, and connecting with telegraph lines in foreign countries and among the lines forming component parts of said system were the telegraph lines situated in the State of Askansas, most of which were constructed since the acceptance by the telegraph company of the said act of Congress.

The averments of the bill, further, are, that said lines were constructed in the state of Arkansas with the consent and permission of the state and in accordance with the laws of the state and that there has been invested in the lines of said system, more than $153,000 and that those lines have been used continuously, from the time of their construction, for the transmission of the messages for the government of the United States and the several departments thereof, and for the public, and as an instrumentality of the postal department and of commerce, not only wholly within the state of Arkansas, but for interstate commerce, and commerce between said state and foreign countries.

The effect of this act of July 24th, 1866, has been considered by this court in a number of cases, from which it is unnecessary to quote, but the result of which establishes conclusively and definitely, that the Telegraph Company under this act, is an instrumentality of the government of the United States, which a state cannot exclude from its borders and that such telegraph company is likewise an instrumentality of interstate commerce, the exclusive power to regulate which is vested in the Congress of the United States.

The following authorities support this proposition :

Pensacola Telegraph Company vs. W. U. Tel. Co., 96 U. S., 1 ; Telegraph Co. vs. Texas, 105 U. S., 460 ; W. U. Tel. Co. vs. Massachusetts, 125 U. S., 530 ; LaLoup vs. Port of Mobile, 127 U. S., 640 ; W. U. Tel. Co. vs. Penn. R. R. Co., 195 U. S., 540 ; W. U. Tel. Co. vs. St. Louis, 148 U. S., 92.

Notwithstanding the rights of the Telegraph Company under the provisions of this act, as an instrumentality of the government of the United States, and notwithstanding the rights which it would have under the facts alleged in the bill, as an instrumentality of interstate commerce, to operate its lines in Arkansas as a part of its system existing in other states, for the transmission of intelligence for the government of the United States, and for the public, engaged in interstate commerce, we find in section 2 of the Act of Arkansas under consideration, an absolute prohibition against the transaction of any business within the State of Arkansas, unless and until the Telegraph Company shall have complied with the provisions of the Act and have paid into the Treasury the large sum of money necessary for permission to operate its property within that state, and in the event of its doing any business without having complied, the excessive fine of $1,000 for the transaction of any such business is imposed and it is made the specific duty of the prosecuting attorney of any county where the business is transacted, to enforce the collection of such fine.

This act draws no distinction in respect to the character of the business, as to whether it is Governmental, interstate, or domestic, and therefore, the legislation is precisely like that considered by this court in the case of Crutcher vs. Kentucky, 141 U. S., 47, in which the State of Kentucky undertook to impose a license fee of $2.50 on such express agent and to require as a condition of issuing the license a showing that the Company was possessed of $150,000 of capital.

The United States Express Company which was doing both interstate and local business in Kentucky, refused to pay the license fees for its agents, and Crutcher, one of its agents, was arrested and fined.

The Court of Appeals of Kentucky sustained the Act as legitimate and valid legislation. The case was carried to the Supreme Court of the United States, which held that interstate commerce must remain untrammeled by the state, and that even the trifling

license fee called for by the Act could not be collected. In that case Mr. Justice BRADLEY said:

"We regret that we are unable to concur with the learned Court of Appeals of Kentucky in its views on this subject. The law of Kentucky, which is brought in question by the case, requires from the agent of every express company not incorporated by the laws of Kentucky a license from the auditor of public accounts, before he can carry on any business for said Company in the State. This, of course, embraces interstate business as well as business confined wholly within the State. It is a prohibition against the carrying on of such business without a compliance with the State law. And not only is a license required to be obtained by the agent, but a statement must be filed in the auditor's office showing that the company is possessed of an actual capital of $150,000, either in cash or in safe investments, exclusive of stock notes. If the subject was one which appertained to the jurisdiction of the state legislation, it may be that the requirements and conditions of doing business within the State would be promotive of the public good. It is clear, however, that it would be a regulation of interstate commerce in its application to corporations or associations engaged in that business; and that is a subject which belongs to the jurisdiction of the national and not the state legislature. Congress would undoubtedly have the right to exact from associations of that kind any guarantees it may deem necessary for the public security, and for the faithful transaction of business; and as it is within the province of Congress, it is to be presumed that Congress has done, or will do, all that is necessary and proper in that regard. Besides, it is not to be presumed that the State of its origin has neglected to require from any such corporation proper guarantees as to capital and other securities necessary for the public safety. If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the State; it is a right which every citizen of the United States is entitled to exercise under the Constitution and Laws

of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

"It has frequently been laid down by this court that the power of Congress over interstate commerce, is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation—an English or a French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining a license from some state officer, and filing a sworn statement as to the amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation (Inman Steamship Co. v. Tinker, 94 U. S., 238). The prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce belong to the government of the United States and not to the governments of the several States; and confidence in that regard may be reposed in the national legislature without any anxiety or apprehension arising from the fact that the subject matter is not within the province or jurisdiction of the state legislature. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two (Telegraph Co. v. Texas, 105 U. S., 460; Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196, 205, 211; Phila. Steamship Co. v. Pennsylvania, 122 U. S., 326, 342; McAll v. California, 136 U. S., 104, 110; Norfolk & Western Railroad v. Pennsylvania, 136 U. S., 114, 118). As was said by Mr. Justice LAMAR in the case last cited: 'It is well settled by numerous decisions of this court that a State cannot under the guise of a license tax exclude from its jurisdiction a foreign corporation engaged in interstate commerce or impose any burden upon such commerce within its limits.'

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to

take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it (Pickard v. Pullman Southern Car Co., 117 U. S., 34; Robbins v. Shelby County Taxing Districts, 120 U. S., 489; LeLoup v. Mobile, 127 U. S., 640; Asher v. Texas, 128 U. S., 129; Stoutenburg v. Hennick, 129 U. S., 141; McCall v. California, 136 U. S., 104; Norfolk & Western Railroad Co. v. Pennsylvania, 136 U. S., 114).

"As a summation of the whole matter it was aptly said by the present Chief Justice in Lyng v. Michigan, 135 U. S., 161, 166: 'We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress.'

"We do not think that the difficulty is at all obviated by the fact that the express company, as incidental to its main business (which is to carry goods between different States), does also some local business by carrying goods from one point to another within the State of Kentucky. This is probably quite as much for the accommodation of the people of that State as for the advantage of the company. But, whether so or not, it does not obviate the objection that the regulations as to license and capital stock are imposed as conditions on the company's carrying on the business of interstate commerce, which was manifestly the principal object of its organization. These regulations are clearly a burden and a restriction upon that commerce. Whether intended as such or not, they operate as such."

It may be argued that the Act of the State of Arkansas, forbidding the doing of business until the license fee shall have been paid, is valid as applied to the domestic business, and that, if the Act is thus interpreted by the state authorities, it can be sustained under the principles of the cases of Osborn vs. Florida, 164 U. S., 650; Pullman Company vs. Adams, 189 U. S., 420: Allen vs. Pullman Palace Car Co., 191 U. S., 171; New York vs. Pa. R. R. Co., 192 U. S., 21.

In these cases, the acts sustained by this court either expressly separated the local business of the companies affected from the interstate business, and left it optional with the company affected, to continue its domestic business, or to discontinue it, or the act had been so interpreted by the courts of the state, and this court simply accepted such construction of the act as made by the state courts. At any rate, in all those cases, upon one ground or the other, domestic business alone was subjected to the provisions of the acts in question, and the companies affected were free to continue this business or to discontinue it.

In this case none of the state courts of Arkansas have passed upon the meaning of this act, and its terms are explicit and cover every class of business which the telegraph company could engage in, and make no distinction whatever between the domestic and the interstate and governmental business. There is therefore no ground for the attempted application of the act, only to one particular class of business.

In addition to the foregoing, at the time this statute was enacted, the following statute of Arkansas was in full force affecting this Telegraph Company.

"Every Telegraph or Telephone Company doing business in this state must under penalty of $500 for each and every refusal so to do, transmit over its lines to localities on its lines for any individual or corporation or other telegraph company, or telephone company, such messages, dispatches or correspondence as may be tendered to it by, or to be transmitted to, any individual or corporation or other telegraph company or telephone companies at the price customarily obtained for the transmission of similar messages, dispatches or correspondence without discrimination as to charge or promptness; the penalty herein prescribed shall be recoverable in any court through proper form of law, one-half of which shall go to the prosecutor, and one-half to the State." (Act March 31, 1885, Section 7946 of Kirby's Digest of Arkansas Statutes.)

The statute of May 13th, 1907, requiring a license in no way sought to repeal or modify this act of 1885

Under this Act of 1885, if the Company opened offices in Arkansas for governmental and interstate business, it would be required to receive and transmit messages as between those offices situated wholly within the State of Arkansas, under a penalty of $500 for each and every refusal so to do. The telegraph company was therefore not like the Pullman Palace Car Company in 189 U. S., or 191 U. S.; nor like the Express Company in Osborn vs. Florida, 164 U. S. Having constructed its lines in the State of Arkansas and having offices open and ready for the transmission of governmental and interstate business, the state had exercised its police power and had required that at every one of those offices, business tendered for any other of the offices in that state should be received, and transmitted under the severe penalty named in the act. The state has not undertaken by the legislation in question to prevent the telegraph company from doing a domestic business, unless it shall pay the license fee, the taxes on the interstate and on the local business under the act being inseparable. The condition named in the act for the right to do business of any kind within the state is the payment of the one license fee named. The unconstitutional part of the act, to wit: the payment of a license fee as a condition of the right to do interstate and government business, cannot be separated from the right to do purely domestic business and therefore, the whole act fails, as was said, in U. S. vs. Reese, 92 U. S., 271:

"We are not able to reject a part of which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by disregarding those that are not now there. Each of the sections must stand as a whole or fail altogether."

To the same effect :

The Trade Mark cases, 100 U. S., 82; James vs. Bowman, 190 U. S., 127.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 146.

WESTERN UNION TELEGRAPH CO., APPELLANT,

vs.

P. R. ANDREWS ET AL., APPELLEES.

No. 233.

OSWALD C. LUDWIG, AS SECRETARY OF STATE OF ARKANSAS, APPELLANT,

vs.

WESTERN UNION TELEGRAPH CO., APPELLEE.

ADDITIONAL BRIEF FOR WESTERN UNION TELEGRAPH COMPANY.

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vs.

WESTERN UNION TELEGRAPH COMPANY,

APPELLEE.

Additional Brief for Western Union Telegraph Company.

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(1) The express cases relied on by counsel for the State are not in point. The business of express companies, like that of insurance companies, requires no permanent investment in the State. They are mere nomads, and when the time comes for them to go they simply fold up their tents and leave.

To find an analogy to telegraph companies, we must turn to railroad companies. Both are public service corporations. Both are part of the postal service of the Government. Both require a permanent structure, which cannot be removed without an almost entire loss.

After a railroad company of one State had been allowed to build into another State, would it be contended that it could be required to give up all its intrastate business, which was perhaps the chief inducement of its coming unless it would pay a large license fee not demanded of domestic railroads? Would not that be plainly a denial of the equal protection of the law?

There is no distinction that can be drawn in this matter between railroad and telegraph companies. Every consideration that applies to the one applies equally to the other. Most of our railroads of any importance penetrate into other States, and if this exaction is sustained they will hold their property at the mercy of the State legislatures. The question now presented is, therefore, of far-reaching importance.

(2) In addition to the contractual rights which the telegraph company acquired under the statutes heretofore quoted, it must be borne in mind that at the time the telegraph company was building its lines it was protected by section 11, article 12, of the Constitution of Arkansas, which is as follows:

"Foreign corporations may be authorized to do business in this State, under such limitations and restrictions as may be prescribed by law; provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served; *and, as to contracts made or business done in this State, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State;* and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State; nor shall they have power to condemn or appropriate private property."

This was the telegraph company's guaranty that it should be subject only to the same burdens as were imposed on domestic corporations. On the faith of this guaranty the investment was made. But, as we have shown in our original brief, this act now in question imposes on foreign corporations many burdens that are not imposed on domestic ones, and so deprives the telegraph company of the equal protection of the law.

The language quoted above from the constitution of Arkansas is precisely the same as the language which in Amer Smelting Co. *v.* Colorado, 204 U. S., 103, was held to constitute a contract. (See pages 105, 113.)

The terms of the Colorado statute are thus given on page 105:

"And such corporations shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers."

It will be perceived that it is in substance the same as the language of the Arkansas constitution italicized above.

In construing this language this court said, page 113:

"A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, &c., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed on such domestic corporations. The power to impose different liabilities was with the State at the outset. It could make them greater or less than in the case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming into the State should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporation should be subjected to the same liabilities. In other words, the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and the limit of the liabilities, restrictions and duties which might thereafter be imposed upon

the corporation thus admitted to do business in the State. It was not a mere license to come in the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State, without further limitation. It was a clear contract that the liabilities, &c., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic corporation at the same time and to the same extent."

Nor can the exaction be sustained as an amendment to the charter. That was tried in the Colorado case, and the court said, page 114:

"Nor is this a case where the power given by the State constitution to the general assembly to alter, amend or annul a charter is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation which up to the time of its enactment had been imposed on all foreign corporations doing business in the State."

(3) The cases which counsel cite as to the strict construction of statutes granting exemptions from taxation have no bearing on this case. The telegraph company is not evading taxation. It pays cheerfully a tax on its property and also a franchise tax—all the taxes, in short, that are imposed on domestic corporations. It complains only of the discrimination which is made against it.

(4) Counsel assume that this court will construe the act now in question as applying only to intrastate business, because a somewhat similar act was so construed by the Supreme Court of Arkansas. But it is by no means certain that that court would now give such a construction to this act. One of the judges dissented, and two of those who favored that construction have since been replaced, so that if the two new judges should agree with him who dissented the ruling would be the other way, and even those who concurred might change their minds.

This court is bound by a construction of a State statute made by the State Supreme Court; but we have yet to learn that it will yield its own judgment to what it thinks would probably be the judgment of the State court. Unless the act has been directly passed upon, this court exercises its own judgment in its construction, and it has always held that acts in general terms like this would be construed as applying equally to interstate and domestic commerce, and as therefore an invasion of the province of the National Government.

LaLoup *v.* Mobile, 127 U. S., 640.

Crutcher *v.* Kentucky, 141 U. S., 47, and the numerous cases cited therein.

7. We submit that this statute should be so construed as to make it constitutional, if that be possible. The scale of fees therein are by its third section applied only to domestic corporations thereafter incorporated and foreign corporations "seeking to do business" in the State. Is not "seeking to do business" the same as "applying to do business?" Is a corporation that is already in the State, actively doing business every moment of the day and night, merely seeking to do business? If the act be so construed its worst features are eliminated. A corporation not in the State and seeking to come in if unwilling to pay the fees can keep out, and so will suffer no injustice.

Respectfully,

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs.

No. ~~382~~ 446

P. R. ANDREWS, ET AL., APPELLEES,

AND

O. C. LUDWIG, AS SECRETARY OF STATE, APPELLANT,

vs.

No. ~~233~~ 445

WESTERN UNION TELEGRAPH COMPANY, APPELLEE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE STATE OF ARKANSAS.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908.

WESTERN UNION TELEGRAPH COMPANY, APPELLANT,

vs. No. 408.

P. R. ANDREWS, ET AL., APPELLEES,

AND

O. C. LUDWIG, AS SECRETARY OF STATE, APPELLANT,

vs. No. 233.

WESTERN UNION TELEGRAPH COMPANY, APPELLEE.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR THE STATE OF ARKANSAS.

STATEMENT OF CASE.

Except as stated herein appellant's statement of the case is substantially correct, but for the court's convenience we make the following statement:

These are suits by the Western Union Telegraph Company, a foreign corporation, appellant in No. 408 and appellee in No. 233 (hereafter called appellant), to

prevent by injunction the officers of the State of Arkansas from enforcing against it the following Act of the legislature prescribing the conditions upon which foreign corporations may do business in the State, approved May 13, 1907, and known as the "Wingo Act," and challenging same as in conflict with the Constitution of the United States:

"Act 313. An Act to Permit Foreign Corporations to do Business in Arkansas and Fixing the Fees to be Paid by All Corporations.

"Section 1. Every company or corporation incorporated under the laws of any other State, territory or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in the State, shall file in the office of the Secretary of State of this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served. Provided, before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any com-

pany shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal Court, or shall institute any suit or proceeding against any citizen of this State in any Federal Court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall thereafter continue to do business in this State, it shall be subject to the penalty of this Act for each day it shall continue to do business in this State after such revocation.

"Sec. 2. Any foreign corporation which shall fail to comply with the provisions of this Act, and shall do any business in this State, shall be subject to a fine or not less than $1000.00, to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue; and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the county in which the suit is brought; and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered, and as an additional penalty, any foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, can not make any contract in this State which can be enforced by it either in law or in equity, and the complying with the provisions of this Act after suit is instituted shall in no way validate said contract.

"Sec. 3. That all corporations hereafter incorporated in this State and all foreign corporations seeking to do business in this State shall pay into the treasury of this State for the filing of said articles a fee of $25.00 where the capital stock is $50,000 or

under; $75.00 where the capital stock is over $50,000 and not more than $100,000; and $25.00 additional for each $100,000 of capital stock.

"Any foreign mutual corporation having no capital stock shall be required to pay to the Secretary of State for filing its articles of incorporation the sum of $500.00. Provided, however, nothing in this section shall apply to fraternal orders that write insurance.

"Sec. 4. That Act 185, approved April 17, 1907, and entitled 'An Act to provide a manner in which foreign corporations may become domestic corporations, and for other purposes,' and all laws and parts of laws in conflict herewith be, and the same are, hereby repealed, and that this Act take effect and be in force from and after its passage."

The appellant is a corporation of the State of New York, and has $100,000,000 in capital stock, and is required to pay by said Act to do business in the State of Arkansas fees of $25,050.00, the same fees that are required of domestic corporations with like capital organizing in the State. The suit against the prosecuting attorneys was dismissed upon motion and demurrer as a suit against the State, and the demurrer of the Secretary of State in the second suit was overruled, the Act declared unconstitutional, and the Secretary enjoined from enforcing it.

The bill in each case contains many of the same allegations, and states that complainant is a corporation organized under the laws of New York; that it

accepted the terms of the Act of Congress of 1866; does a telegraph business throughout the United States and foreign countries, and also does local or intrastate business in the State of Arkansas. That it entered the State thirty or forty years ago with the State's consent, and has continued to extend and operate its lines of telegraph within the State with its consent, and "has complied with all the reasonable, just and valid provisions and requirements of the laws of said State of Arkansas at all times, and is now complying in all respects with the reasonable, just and valid provisions and requirements of the laws of said State, and expects and intends always to do so." (R., 3.)

In No. 408 vs. the Prosecuting Attorneys, it alleges:

"Fourteenth. Your orator further says that it originally entered the State of Arkansas and constructed its lines of telegraph and operated the same as hereinbefore described with the consent of the said State of Arkansas some thirty or forty years ago, and during all the intervening years has continued to extend and operate its lines of telegraph within said State with the consent of said State, and said State from time to time through its legislative enactments has recognized the rights of your orator to transact the business aforesaid in the State of Arkansas and from time to time has passed laws regulating the conduct and affairs of your orator's business in said State, as shown by numerous statutes to which your orator begs leave to refer; and your orator avers that

it is now, and for more than thirty years last past has been, a foreign corporation, doing business in said State, and in reliance upon such license and acquiescence has expended large sums of money in said State for the purpose of transmitting messages between the people of said State, to-wit, the sum of $153,000.00; and your orator avers that said State may not withdraw its said license from your orator and expel it from said State; and that the enactment of the legislature of said State of May 13, 1907, herein complained of, impairs the obligation of the contract created as aforesaid between the said State and your orator, and so violates the Constitution of the United States." (R., 7.)

Appellant does not allege in said bill that it has ever complied with any statute of the State of Arkansas authorizing foreign corporations to do business in the State, nor that it has complied with any statute of the State, a compliance with which would give it an inviolable contract with the State to enter and do business here, or that it had such right otherwise than as is alleged in said paragraph fourteen. In the bill in this suit there is no allegation that it complied with the Act of April 4, 1887, nor of March 31, 1885.

In the amendment to its bill against the Secretary of State it alleges that it has complied with the statute of the State of Arkansas approved March 31, 1885 (Kirby's Digest, Secs. 7940-7947), an Act authorizing any corporation organized under the laws of the State of Arkansas, or any other State, or of the United

States, to construct, maintain and operate telegraph lines over and along public highways and streets, across the waters and over public works and lands of the State, and on and over lands of individuals, etc. "That complainant has performed all and singular the duties and obligations imposed upon it by said Act, and had prior thereto constructed and had in operation some lines of telegraph in this State, and was engaged in business herein as a foreign corporation, and had invested in said telegraph plant many thousand dollars. That after the enactment of said Act it extended its lines and increased its offices and expended many thousand dollars additional in equipping and perfecting its plants for the transmission of intelligence by telegraph, and has in the said State many offices, wires, poles, electrical appliances, much of which has been invested under the privilege and agreement made by the State of Arkansas to telegraph companies embodied in said Act, etc." "Complainant further says that the invitation and privileges extended by the said Act of the Legislature of Arkansas constituted a contract, and the action thereon by complainant and its assumption of the obligations therein imposed constituted a contract between the complainant and the State of Arkansas, and on the faith of the integrity of said contract complainant has made the investments

and created the plant herein before described." That it complied with the Act of April 4, 1887. "That the Constitution of the State of Arkansas provided that foreign corporations may be authorized to do business in this State, and shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall have the same rights and privileges as like corporations of the State." (R., 17.)

In No. 233 appellant O. C. Ludwig as Secretary of State assigned as errors that the court erred in holding it had jurisdiction in the case, and in holding that by filing a certificate, under the Act of 1887, and a certificate on July 21, 1905, with the Secretary of State, and a copy of its articles of incorporation, and paying a filing fee of $100, and by making large investments in the State after the passage of the Act of March 31, 1885, complainant had a contract to continue business in the State of Arkansas, exempting it from the payment of the license fee required by the said "Wingo Act." (R., 29.)

The statement on page 5 of appellant's brief, that complainant complied with the statute of Arkansas, approved February 16, 1899, set out on said page is challenged. The bill does not allege it in either case. And since such statement is made, we think it not inappropriate to say that complainant never did comply

with said statute nor attempt to do so, but willfully violated it during all the time it was in force, and was punished for its disobedience.

Western Union Tel. Co. vs. State,
82 *Ark.*, 309.

The course of legislation of the State prescribing conditions upon which foreign corporations may do business here is as follows:

In 1887 a statute was enacted providing that before any foreign corporation should begin to carry on any business in the State it should, by a certificate under the hand of the president, filed in the office of the Secretary of State, designate a citizen of the State as agent upon whom process against it might be served, and also stating its principal place of business.

Act April 4, 1887.

Appellant filed the certificate required by this statute.

On February 16, 1899, another statute was passed, section 1 of which is substantially the same as the former statute just referred to; and section 2, as amended by a later Act passed the same session, on May 8, 1899, reads as follows:

"Section 2. Every company or corporation incorporated under the laws of any other State, territory

or country, now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State a copy of its charter, or articles of incorporation or association, or in case such company or corporation is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly authenticated and certified by the proper authority. The Secretary of State shall cause all such charters, articles of incorporation or association so filed to be duly recorded in a book kept for that purpose. And such corporation shall be required to pay into the treasury of the State incorporating and other fees equal to those required of similar corporations formed within and under the laws of this State. Upon compliance with the above provisions by said corporation, a copy of such charter or articles of incorporation or certificate so filed, properly certified under the seal of his office, and a copy of such charter or articles of incorporation or certificate, certified to by the Secretary of State, shall be taken by all the courts of this State as evidence that the said corporation has complied with the provisions of this Act, and is entitled to all the rights and benefits therein conferred. And such corporations shall be entitled to all the rights and privileges and subject to all the penalties conferred and imposed by the laws of this State upon similar corporations formed and existing under the laws of this State. Provided, that the provisions of this Act requiring copy of original articles of incorporation or charter, and certificate naming an agent, and to pay certain fees therefor, shall not apply to railroad companies which have heretofore built their lines of railroad into or through this State; provided further, that the provisions of this Act are not intended and shall not apply to 'drummers' or traveling salesmen soliciting business in this State for foreign corporations which are entirely non-residental."

Section 3 of the Act imposed a fine of not less than $1000.00 upon any foreign corporation which should fail or refuse to comply with the terms of the statute, and section 4 allowed corporations then doing business within the State ninety days from the passage of the Act to comply with its terms.

This is the Act about which appellant's statement in its brief is challenged, and with which it did not comply.

The legislature passed another Act, April 23, 1901, entitled, "An Act to regulate foreign corporations other than railway, express, telegraph, palace car and insurance corporations," and expressly provided that it should not apply to such excepted corporations.

The Supreme Court of Arkansas decided that it repealed the foregoing section 2 of the Act of May 8, 1899.

Western Union Tel. Co. vs. State,
82 *Ark.*, 302.

The Act of May 6, 1905, provides:

"Section 1. All corporations, foreign or domestic, except railway corporations, which shall file articles of incorporation for doing business in this State, and the capital stock of which is $25,000 or under, shall pay to the Secretary of State a fee of $30.00 for the filing of said articles and issuing of a charter; and shall pay an

additional fee of $5.00 for each additional $25.00 of its capital stock; said fee to be in addition to the fee now required by law to be paid to the county clerk of the county of said incorporation's domicile."

Section 2 fixes fees to be paid by railroad corporations.

After the passage of this Act, complainant filed a copy of its articles with the Secretary of State on July 21, 1905, and an appointment of an agent for the service of process upon it, and paid a fee of $100.00. (R., 29) The fees prescribed by this Act for a corporation with its capital stock were $19,494.00.

The Supreme Court held that this Act did not require any corporation to file articles of incorporation. "Its manifold object was merely to fix the scale of fees to be paid by such corporations that other statutes required or might thereafter require."

Western Union Tel Co. vs. State, Supra.

The "Wingo Act," already set out and complained about as unconstitutional, is the last upon the subject.

The Constitution provides:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more

known places of business, and an authorized agent or agents in the same upon whom process may be served; *and as to contracts made or business done in this State*, they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property.

"Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revokable at the adoption of this Constitution, or any that may hereafter be created, whenever, in their opinion, it may be injurious to the citizens of this State, in such a manner, however, that no injustice shall be done to the corporations."

Sections 11, 6, *Art.* 12, *Constitution.*

ARGUMENT.

RIGHT OF THE STATE TO PRESCRIBE TERMS ON WHICH FOREIGN CORPORATIONS MAY DO BUSINESS IN IT.

It is now settled beyond question that a State has plenary power to prescribe such terms as pleases it upon which foreign corporations may enter and do business. That it has power to refuse admission to a foreign corporation not engaged in interstate commerce or governmental service, and to prescribe terms upon which a foreign corporation engaged in interstate commerce and the service of the government may do intrastate business. Has the power to prevent a foreign corporation from doing business at all within its borders, unless such prohibition is so conditioned as to violate the Federal or its own Constitution.

Hammond Packing Co. vs. State,
Ms. opinion, Feb. 23, 1909.

American Smelting and R. Co. vs. Colorado,
204 *U. S.*, 103.

Security Mutual Life Ins. Co. vs. Prewett,
202 *U. S.*, 246.

Hooper vs. California, 155 *U. S.*, 648.

Allgeyer vs. Louisiana, 165 *U. S.*, 578.

Osborne vs. Florida, 164 *U. S.*, 650.

Pullman Co. vs. Adams, 189 *U. S.*, 420.

Armour Packing Co. vs. Lacy, 200 *U. S.*, 226.

Kehrer vs. Stewart, 197 *U. S.*, 60.

State vs. Lancashire Ins. Co., 66 *Ark.*, 466.

Woodson vs. State, 69 *Ark.*, 528.

Western Union Tel. Co. vs. State, 82 *Ark.*, 302.

Waters-Pierce Oil Co. vs. Texas, 177 *U. S.*, 28.

Orient Ins. Co. vs. Daggs, 172 *U. S.*, 557.

John Hancock Mut. Life Ins. Co. vs. Warner, 181 *U. S.*, 73.

It may prescribe as such condition a forfeiture of its right to do business upon removal of a cause to the Federal court or the bringing of suit in the Federal court without the consent of the opposite party.

Security Mutual Life Ins. Co. vs. Prewett, 202 *U. S.*, 246.

Doyle vs. Continental Ins. Co., 94 *U. S.*, 535.

In Insurance Company vs. Prewett, *supra*, this court held a statute valid that prescribed such forfeiture in the exact terms of the "Wingo Act."

THE COURT WAS WITHOUT JURISDICTION, THIS BEING A SUIT AGAINST THE STATE.

The court dismissed the first suit for want of jurisdiction as in effect a suit against the State. The question was raised by motion and also by demurrer, and a general demurrer was interposed to the bill. (R., 12.) The suit was to enjoin the prosecuting attorneys of the State, the officers charged by general laws with the duty of enforcing the laws of the State by suits for penalties and prosecutions in the name of the State for their violation, and with the duty of enforcing its laws by proceedings in the State's name for the collection and protection of its revenues. The Act fixes a license fee or tax to be paid by foreign corporations to the State for its privilege or franchise of allowing such corporations to do business within the State upon the same terms and conditions as domestic corporations.

The penalty suits by its said prosecuting attorneys in its courts, for the collection of its said license tax for its benefit, is its method of enforcing the payment of same. The State is the real party in interest against which the relief is asked and the judgment operates. Counsel for appellant have well said, in the

opening sentence of their brief: "These two suits are brought to test the constitutionality of the following statute," etc.—not to prevent a trespass of individuals against its property. The judgment of dismissal for want of jurisdiction as a suit against the State is right and fully warranted under authority of In re Ayers, 123 U. S., 443, 487, 502, 503; Fitts vs. Magee, 172 U. S., 516, 528, and the other cases cited and reviewed in the very able and exhaustive opinion of the learned judge herein. We cite this opinion as all there is to be said upon this point. We are not able to improve upon it. (R., 15-28.)

Western Union Tel. Co. vs. Andrews,
154 *Fed.*, 95.

This case is not like that of *Ex Parte Young*, 209 *U. S.*, 124. There certain officers of Minnesota, including the attorney general, had been enjoined from enforcing a statute of the State that had been declared unconstitutional by a Federal court, and the attorney general of the State was cited and fined for contempt for attempting to enforce such adjudged unconstitutional statute after the preliminary injunction granted, in order solely to retain the entire and exclusive jurisdiction by, and to uphold and enforce the orders and decrees of the court that had first assumed jurisdiction of the cause. Upon a *habeas corpus* pro-

ceeding, this court held that such officer was not the State in the proceeding to enforce the enjoined statute —that he was "stripped of his official or representative character," and did not represent the State—and was properly punished for the contempt. There is no such condition here, and the doctrine of the Young case should not be extended. If, however, this court shall conclude that all the cases cited in *Western Union vs. Andrews, supra,* are overruled by *Ex Parte Young,* and that this case is controlled by that, the judgment of dismissal is right in any event. The bill in this case does not allege compliance with any statute of the State of Arkansas authorizing foreign corporations to do business in the State, nor that it has a contract with the State under any statute authorizing it to do intrastate business; shows that it is a foreign corporation; that it came into the State forty years ago without objection on the part of the State; and now claims the right by prescription to exemption from the payment of such license tax and to forever do intrastate business upon equality with domestic corporations. The settled rule of construction by the Supreme Court of the State shows that the statute complained about only relates to the doing of non-governmental intrastate business by foreign corporations, and is a valid Act;

and the bill on its face does not show the appellant entitled to the relief prayed for.

We do not think the time has come in the progress of jurisprudence when the highest court of last resort will declare that a foreign corporation may acquire exemption from the payment of a license tax, which a sovereign State had the unquestioned power to impose, by prescription.

THE WINGO ACT IS NOT IN VIOLATION OF THE TELEGRAPH COMPANY'S RIGHTS UNDER ACT OF CONGRESS OF 1866, NOR AN INTERFERENCE WITH INTERSTATE COMMERCE.

The telegraph company's persistence in pleading its acceptance of the said Act of 1866 in bar of all duties, regulations, taxes, restrictions and limitations, prescribed by commissions, cities and States, at all times and everywhere, without regard to whether they be just or right, strongly indicates that it holds with the ancient cynic that "the law is likely to be anything that is plausibly stated and vociferously maintained," and hopes finally because of its much troubling that the courts will declare it immune from all State regulation.

It is true the Act is a general statute and its terms are broad and inclusive. It provides:

"Section 1. Every company or corporation incorporated under the laws of any other State, territory or country, including foreign railroad and foreign fire and life insurance companies, now or hereafter doing business in this State, shall file in the office of the Secretary of State, etc. * * * Provided, before authority is granted to any foreign corporation to do business in this State, etc.

"Sec. 2. Any foreign corporation which shall fail to comply with the provisions of this Act, and shall do any business in this State, shall be subject, etc.

"Sec. 3. That all corporations hereafter incorporated in this State, and all foreign corporations seeking to do business in this State, shall pay into the treasury of this State for the filing of said articles a fee of $25.00 where the capital stock is $50,000.00 or under; $75.00 where the capital stock is over $50,000.00 and not more than $100,000.00; and $25.00 additional for each $100,000.00 of capital stock."

But the terms of this statute must be interpreted with reference to the State's plenary power over its purely internal commerce and over foreign corporations seeking to engage in such commerce; and so construed, the law applies to all foreign corporations not engaged in interstate commerce or business for the federal government, and to all foreign corporations engaged in interstate commerce or business for the federal government to the extent that they must comply with its requirements in order to engage in

non-governmental intrastate business. The terms "seeking to do business in this State" and "doing business in this State" mean and include only intrastate business, for such only has the State power to regulate. Such language in general statutes and all inclusive has been held almost uniformly of late to mean, relate to, regulate and impose restrictions upon commerce intrastate only, and such statutes held to be valid and within the power of the States to enact, and not in conflict with the Constitution of the United States as attempts to restrict, regulate or lay burdens upon interstate commerce or governmental business. The highest court of the State of Arkansas has adopted such construction, and since all the objections raised against this statute were urged against the like Act passed upon by that court, the case is referred to at some length.

In Western Union Telegraph Company vs. State, 82 Ark., 309, 321, the court said:

"Appellant is a corporation organized under the laws of the State of New York, and does a telegraph business throughout the United States and foreign countries, and also does local or intrastate business in the State of Arkansas. This is an action instituted by the prosecuting attorney on behalf of the State against appellant to recover the penalty prescribed by statute for its failure to file with the Secretary of State a copy of its articles of corporation and to pay

the fee therefor required by law. The statute alleged to have been violated by appellant is as follows:

"'Section 2. Every company or corporation incorporated under the laws of any State, territory or country, now or hereafter doing business in this State, shall file in the office of Secretary of State of this State a copy of its charter, or articles of incorporation, or association; or, in case such company or corporation is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly authenticated and certified by the proper authority. The Secretary of State shall cause all such charters, articles of incorporation or association, so filed, to be duly recorded in a book kept for that purpose. And such corporation shall be required to pay into the treasury of the State incorporating and other fees equal to those required of similar corporations formed within and under the laws of this State.

"'Upon compliance with the above provisions by said corporations, the Secretary of State shall cause to be issued to said corporation a copy of such charter, or articles of incorporation, or certificate so filed, properly certified under the seal of his office, and a copy of such charter or articles of incorporation or certificate, certified to by the Secretary of State, shall be taken by all the courts of this State as evidence that the said corporation has complied with the provisions of this Act, and is entitled to all the rights and benefits therein conferred. And such corporation shall be entitled to all the rights and privileges and subject to all the penalties conferred and imposed by the laws of this State upon similar corporations formed and existing under the laws of this State; provided, that the provisions of this Act requiring copy of original articles of incorporation or charter, and certificate naming an agent, and to pay certain fees therefor, shall not apply to railroad companies which have heretofore built their lines of railroad into or through this

State; provided, further, that the provisions of this Act are not intended and shall not apply to "drummers" or traveling salesmen soliciting business in the State for foreign corporations which are entirely non-resident.

" 'Sec. 3. On and after the going into effect of this Act, any foreign corporation, as defined above, which shall refuse or fail to comply with this Act, shall be subject to a fine of not less than one thousand ($1000.00) dollars, to be recovered before any court of competent jurisdiction; and it is hereby made the duty of the prosecuting attorneys of the different judicial districts of this State to see to the proper enforcement of this Act. All such fines so recovered shall be paid into the general revenue fund of the county in which the cause shall accrue. In addition to which penalty, or after the going into effect of this Act, no foreign corporation, as above defined, which shall fail to comply with this Act, can maintain any suit or action, either legal or equitable, in any of the courts of this State, upon any demand, whether arising out of contract or tort.' (Section 2, Act of February 16, 1899, as amended by Act of May 8, 1899, and Section 3, Act of February 16, 1899.)

"Section 4 of the same Act allowed corporations then doing business in the State ninety days from its passage within which to comply with its terms. * * The defense relied upon by the appellant is predicated upon three propositions of law, set forth in the following declarations which its counsel asked the trial court to make, and which were each refused:

" 'First. The defendant is engaged in interstate and foreign commerce, and the Act relied upon by the plaintiff is, as to it, an interference with the power of congress over interstate and foreign commerce.

" 'Second. The defendant having accepted the provisions of the Act of Congress of July 24, 1866,

entitled "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," it has the right to do business in this State, and the Act relied upon by the plaintiff can have no application to the defendant.

" 'Third. The defendant can not be excluded from doing business in the State of Arkansas, because to do so would operate as a taking of the defendant's property without due process of law, and would be a denial to the defendant of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.'

"It must be readily conceded, and is conceded in argument by counsel for the State, that it is beyond the power of the State, under the guise either of a license tax or police regulation, to impose burdens upon interstate commerce or to deny a foreign corporation the right to engage in such commerce in the State. This question is now to well settled to be debated. *Leloup vs. Port of Mobile*, 127 *U. S.*, 640; *Crutcher vs. Kentucky*, 141 *U. S.*, 47; *Brennan vs. Titsville*, 153 *U. S.*, 289. On the other hand, counsel for appellee concede in the argument that the State has power to impose reasonable terms upon the right of a foreign corporation to carry on intrastate commerce, even though such corporation may be also engaged in interstate commerce. *Osborne vs. Florida*, 164 *U. S.*, 650; *Pullman Co. vs. Adams*, 189 *U. S.*, 420; *Allen vs. Pullman Co.*, 191 *U. S.*, 171. The issue in the case, therefore, narrows to the question whether the statute under consideration was an attempt on the part of the State to regulate interstate commerce and to impose a burden upon corporations doing an interstate business, or whether it merely imposed terms and conditions upon which a foreign corporation might do intrastate business herein. * * * We are then to consider the sole question whether the legislature, in en-

acting this statute, did what it had the undoubted power to do, or whether it attempted to do that which it was clearly beyond its power to do.

"The State's power in this respect was as well known then as now, and the law makers are presumed to have been advised of the limitations upon their power in dealing with the subject of regulation of foreign corporations. This court had then rendered a decision defining the limits within which legislation on this subject might go. *Gunn vs. White Sewing Machine Co.*, 57 *Ark.*, 24. Shall we now construe this statute to mean what this court, when it was enacted, had then so recently said was an obvious transcension of the State's power, or shall we say that the law makers intended to have the State put in force a regulation which had been decided to be within its power? These are fit things for our consideration in determining whether or not the statute can be sustained. *Hartford Fire Ins. Co. vs. State*, 76 *Ark.*, 303; *Wells Fargo & Co. vs. Crawford County*, 63 *Ark.*, 576. It is the duty of the court to give the statute such construction, if reasonably consistent with the language employed, as will render it constitutional and valid. 'Whenever an Act can be so construed and applied,' says Sutherland, 'as to avoid conflict with the Constitution, and give it the force of the law, this will be done. Where one construction will make a statute void for conflict with the Constitution, and another would render it valid, the latter will be adopted, though the former at first view is otherwise the more natural interpretation of the language. Every intendment should be made to favor the constitutionality of a statute. The legislature is presumed to act in view of the Constitution, and not to intend a violation of its provisions or the enactment of an invalid law.' 2 *Lewis' Sutherland on Statutory Construction, Sec.* 498.

"The Supreme Court of the United States, in announcing a rule of construction of statutes, said: 'But if there were reason for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the State, assume that it did not overlook the provisions of the Constitution, and designed the Act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the Constitution.' *Granada County Supervisors vs. Brogden*, 112 *U. S.*, 261; *Dow vs. Norris*, 4 *N. H.*, 16; *People vs. Supervisors*, 17 *N. Y.*, 235.

"The case of *Wells Fargo & Co. vs. Crawford County*, 63 *Ark.*, 576, involved a somewhat similar question. The court there said: '* * * We must presume therefore that the legislature knew those provisions and did not intend that the statute should conflict with the Constitution. The legislature knew that it had no power to tax appellant on property situated beyond the limits of the State, and we must presume that there was no intention to do so.' * * *

"In Florida a statute was passed providing that 'all express companies doing business in the State' should pay a license fee in cities and towns, and the Supreme Court of that State construed the statute to apply only to business that is domestic or intrastate, for the reason that any other construction would place it in conflict with the Federal Constitution. *Osborne vs. State*, 33 *Fla.*, 162.

"The Supreme Court of Mississippi similarly construed a statute imposing a privilege tax 'on each sleeping and palace car company carrying passengers from one point to another in this State.' *Pullman Car Co. vs. Adams*, 78 *Miss.*, 814.

"The Supreme Court of Massachusetts also construed a statute of general application to all corporations doing business in the State in a similar way, and said: 'But it is a rule of law that a statute which would be unconstitutional as applied to a certain class of cases, and is constitutional as applied to another class, may be held to have been intended to apply only to the latter class, if this seems in harmony with the general purpose of the legislature.' *Att'y Gen'l vs. Electric Storage Battery Co.*, 188 *Mass.*, 239. * * *

"We think, therefore, that this statute must be construed to have been intended only to impose terms upon the right of a foreign corporation to carry on intrastate business, and that it was a valid statute."

The Florida and Mississippi cases cited in this opinion have been affirmed by the Supreme Court of the United States.

Osborne vs. Florida, 164 *U. S.*, 650.

Pullman Co. vs. Adams, 189 *U. S.*, 420.

Like expressions in statutes of North Carolina and Georgia have been similarly construed and the cases affirmed by this court.

Armour Packing Co. vs. Lacy,
200 *U. S.*, 226.

Kehrer vs. Stewart, 197 *U. S.*, 60.

Other cases in point.

State vs. Telegraph Co., 27 *Mont.*, 394.

State vs. Wagner, 77 *Minn.*, 483.

Western Union Tel. Co. vs. State,
90 *Pac.* (*Kans.*), 307.

Commonwealth vs. George, 153 *Miss.,* 205.

188 *Mass.,* 239.

Gloucester Ferry Co. vs. Pa., 114 *U. S.,* 196.

Norfolk and Western Ry. Co. vs. Pa.,
136 *U. S.,* 114.

The opinion of the Arkansas Supreme Court construing said Act of 1899 was handed down on March 18, 1907, while the legislature was in session; and on the same day another decision holding said Act repealed (Western Union Tel. Co. vs. State, 82 Ark., 302), thus virtually leaving the State without any law prescribing fees to be paid by foreign corporations, and the Wingo Act was immediately passed and approved May 13, 1907. It reads:

"Section 1. Every company or corporation incorporated under the laws of any other State, territory or country, *including foreign railroad and foreign life fire and life insurance companies,* now or hereafter doing business in this State, shall file in the office of the Secretary of State of this State," etc.

This is an exact copy thus far, except the words in italics, of said Act of 1899, construed by said decision. In other words, the legislature virtually re-enacted the Act of 1899 after such judicial construction, added a forfeiture of charter condition applicable to and fixed

fees to be paid by all corporations. And of course the Supreme Court's construction is as much a part of it as if written in the Act.

The expression, "now or hereafter doing business in this State," and others of like import, as "do any business in this State," etc., having received a judicial interpretation, are presumed to be used in that sense in this Act, there being nothing in the Act to indicate a contrary intent.

Beasley vs. Equitable Securities Co.,
72 Ark., 610.

When the legislature adopts the statute of another State the interpretation of such statute by the courts of that State is adopted with it, and how much the more should our own court's construction of an Act re-enacted be conclusive in its interpretation.

Nebraska Nat. Bank vs. Walsh,
68 Ark., 438.
McNutt vs. McNutt, 78 Ark., 352.

This court must say, as did that of Arkansas construing a like Act containing all the all inclusive expressions complained about in this Act, that this statute was intended only to impose terms upon the right of a foreign corporation to carry on intrastate business, and that it is a valid statute; that the telegraph com-

pany, if it does not wish to comply with its terms and pay the fees, can withdraw from doing intrastate business.

But, say learned counsel for the company—after attempting to distinguish the case at bar from Pullman Co. vs. Adams, 189 U. S., 420; Allen vs. Pullman Co., 191 U. S., 171, and other cases cited—other statutes of the State of Arkansas do not allow them to discontinue local business. They quote Section 7946, Kirby's Digest, and continue: "Under that statute, if the company opens two offices in the State for interstate business it must transmit local messages between them. It can not do an exclusively interstate business. The statute undertakes to prevent the companies from doing any kind of business until they have paid the license fee."

We are amazed that so distinguished counsel will press this contention and construction of this statute upon this court, when some of them know, having been of counsel in the case of Western Union Telegraph Co. vs. State, 82 Ark., 318, that the Supreme Court of the State has construed said statute directly opposite to such contention. The court said:

"But it is argued that another statute of this State (Kirby's Digest, Sec. 7946) compels all telegraph companies doing business in the State to accept

and transmit all messages tendered to them, and that it must therefore, whether it will or no, do an intrastate as well as interstate business. That statute must, however, for the reasons hertofore stated, be construed to apply to companies doing the class of business to which the message belongs. If a company is not doing intrastate business, it can not, under this statute, be compelled to receive and transmit messages belonging to that class, even though it may be in the State doing interstate and governmental business pursuant to the Act of Congress."

This section of Kirby's Digest (7946) is part of the Act (Sec. 10) of March 31, 1885, under the terms of which the company claims to have contracted with the State for the right to do intrastate business, and the Supreme Court of the State says the Act does not even apply to a company not authorized to do intrastate business. Such is the construction of this statute by the Supreme Court of the State of Arkansas, and it is binding here.

Hammond Packing Co. vs. State, *Ms. opinion, Feb.* 23, 1909.

Armour Packing Co. vs. Lacy, 200 *U. S.*, 226.

Kehrer vs. Stewart, 197 *U. S.*, 60.

Pullman Co. vs. Adams, 189 *U. S.*, 426.

Osborne vs. Florida, 164 *U. S.*, 650.

THE ACT IS NOT IN VIOLATION OF THE TELEGRAPH COMPANY'S CONTRACT WITH THE STATE, NOR DOES IT DEPRIVE IT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

Appellant, a foreign corporation, claims to have a contract with the State, authorizing it to do intrastate business under the Acts of April 4, 1887, and of March 31, 1885, which exempts it from the payment of the license prescribed by the "Wingo Act."

The principle, that a contract may arise from a legislative enactment, has been reiterated in numberless cases, but it must always rest for its support in the particular case upon the construction to be given the Act.

The State may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, but such deprivation can only follow when it has concluded itself by the use of plain, clear and unequivocal terms, susceptible of no other reasonable construction. The Act of 1885 does not authorize the organization of corporations nor prescribe terms for foreign corporations to do business. According to its terms, no such contract as is claimed by the company could arise upon compliance with it.

It is a general statute—does not address said company, and made no promise to it. The company came into and established itself in the State "some thirty or forty years ago," according to its statement, about fifteen years before the passage of said Act. Said Act of 1885 permitted foreign corporations, *such as were authorized to do business in the State*, along with like corporations of the State, to enter upon the lands of private individuals, turnpikes, and on the right of way and structures of railroads, and survey and locate its lines; gave them authority to construct, operate and maintain telegraph lines along and over the public highways and streets of the cities and towns of the State, across and under the waters, and over any lands or public works belonging to the State; gave them, in other words, the use of the State's right of eminent domain, and a right of way over public property, in accordance with its terms, for the consideration definitely expressed in:

"Section 5. In consideration of the right of way over the public property herein conceded, every telegraph or telephone corporation shall, in the case of war, insurrection or civil commotion of any kind, and for the arrest of criminals, give immediate dispatch at the usual rates of charge to any message connected therewith of any officer of the State or of the United States."

Nothing in the Act indicates an intention, on the part of the State, to prescribe conditions and terms upon which foreign corporations could do business in the State, and its title, which may be looked to in determining the legislative intent—"An Act granting certain privileges to and prescribing certain duties of telegraph and telephone companies, and for other purposes"—does not mention foreign corporations. It includes and applies to such foreign corporations only as have been regularly authorized to do business in the State by compliance with the terms prescribed by statute, because the Constitution of Arkansas prohibits the grant of power to a foreign corporation that has not been domesticated "to condemn or appropriate private property." And the legislature is presumed to have intended to act within its power in passing this Act.

Sec. 11, *Art.* 12, *Const.* 1874.
Russell vs. Ry. Co., 71 *Ark.*, 456.
Western Union Tel. Co. vs. State,
82 *Ark.*, 315.

No provision of it prescribes conditions upon which foreign corporations may do business in the State, nor that such corporations upon taking the benefit of it shall become domestic corporations and entitled to all the rights and "subject to the same

regulations, limitations and liabilities as like corporations of this State." The Supreme Court of Arkansas has held such a provision necessary and to have such effect.

Russell vs. Ry. Co., 71 *Ark.*, 455.

Reading the Act as the terms of its alleged contract, it gave the right of way over public property and the State lands and the use of the right of eminent domain to all such corporations for their promise of quick dispatch at the usual rates of the State's urgent messages and—*that's all.* It contains no specific grant to this particular corporation nor was its terms accepted by it. The company was not required to comply with it; and not being authorized to do business in the State, it is not compelled to observe it, as the Supreme Court held in Tel. Co. vs. State, 82 Ark., *supra.* Compliance with it could not make a contract entitling the company to enter and do intrastate business forever in the State on the same terms with domestic corporations.

It filed a certificate in the office of the Secretary of State, as alleged in its bill in No. 233, as required by the following Act of April 4, 1887:

"Section 1. Before any foreign corporation shall begin to carry on business in this State, it shall, by its certificate under the hand of the president and seal of

such company, filed in the office of the Secretary of State, designate an agent, who shall be a citizen of this State, upon whom service of summons and other process may be made. Such certificate shall also state the principal place of business of such corporation in this State. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the courts of this State.

"Section 2. If any such foreign corporation shall fail to comply with the provisions of the foregoing section, all its contracts with the citizens of this State shall be void as to the corporation, and no court of this State shall enforce the same in favor of the corporation."

Section 3 gave corporations engaged in business in the State ninety days to file certificate.

This law was passed by the State to enable her citizens to enforce without great inconvenience their just demands against foreign corporations doing business in this State under the comity existing between the States. No fees were required to be paid and no provision made that such corporations as filed certificates "shall be entitled to all the rights and privileges and subject to all the penalties conferred and imposed by the laws of this State upon similar corporations formed and existing under the laws of this State," and no contract could arise from a compliance with its terms.

Construing a similar statute of the State of Tennessee, this Court, in Connecticut Mutual Life Ins. Co. vs. Spratley, 172 U. S., 621, 622, said:

"Upon the question relative to the alleged creation of a contract between the State and the company, by the appointment of the Secretary of State as its agent, under the Act of 1875, to receive process for it, we have no doubt. * * * When therefore in 1887 the legislature passed another Act, and therein provided for the service of process, no contract between the State and the corporation was violated thereby, or any of its obligations in anywise impaired, for the reason that no contract had ever existed. Instead of a contract it was a mere license given by the State to a foreign corporation to do business within its limits, upon complying with the rules and regulations provided for by law. That law the State was entirely competent to change at any time by a subsequent statute without being amenable to the charge that such subsequent statute impaired the obligation of a contract between the State and the foreign corporation doing business within its borders under the former Act. * * * In other words, no contract was created by the fact that the company availed itself of the permission to do business within the State under the provisions of the Act of 1875."

This case is in no respect like the Colorado and South Carolina cases, where a compliance with the statutes and payment of the fees required was held to make an inviolable contract.

In American Smelting Co. vs. Colorado, 204 U. S., 103, a foreign corporation made application to enter

the State and paid all the fees required by law—$15,042.50. The law in force, after making provision for the performance of certain conditions by a foreign corporation entering the State, continued: "And such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." Thereupon the Secretary of State issued a certificate, stating the filing of the proper papers with him, and further stating that, "pursuant to the provisions of Section 10 of said Act (1901), I hereby certify that the said company has made full payment of all fees prescribed by law to be paid to the Secretary of State and due at the time of the issuing of this certificate, and is hereby authorized to exercise any corporate powers provided for by law." Certificate was dated May 21, 1901, and at that time there were no other statutes providing for the payment of any charges, fees or taxes for coming into and doing business in the State of Colorado. In 1902 a law was passed requiring foreign corporations to pay an annual license tax of double the amount required of domestic corporations. The court said:

"It is conceded that the corporation has paid all its indebtedness for taxes or otherwise to the State of

Colorado, except the amount demanded under the above mentioned law of 1902, and that it has obeyed all the laws of the State with that exception. * * * The result of these statutes was that the foreign corporation, upon filing the proper papers and paying the statutory fees and obtaining the certificate to that effect from the Secretary of State, obtained the right to enter and do business in Colorado. * * * The right obtained was a right to enter the State and do business therein as a corporation. It was also subject by statute to the liabilities which were or might thereafter be imposed upon domestic corporations of like character. * * *

"It was not a mere license to come into the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both."

South Carolina, following the United States, held in British American Mortgage Co. vs. Jones, 56 S. E., 983, that a foreign corporation that had complied with the conditions prescribed for entry and paid the license, while the law provided that they should be permitted to locate and carry on business "in like manner as the natural born citizens of the State or United States might do, etc., under the law existing at the time," etc., had a contract with the State that entitled it to the same treatment thereafter as domestic corporations.

It is conceded under the authority of American Smelting and Refining Co. vs. Colorado, *supra*, that if the telegraph company had complied with the Act of 1899 prescribing terms upon which foreign corporations could enter the State and do business and paid the fees, or mayhap if it had in good faith complied with the Act of 1905 and paid the fees prescribed, although the Arkansas Supreme Court later decided the Act did not require any corporation to file a copy of its charter, it would have had a contract with the State whose obligation could not be impaired or terms changed, except in accordance with the Act or the power reserved in the Constitution to alter, amend or revoke.

It does not claim to have complied with the Act of 1899 except in its brief herein, and its statement there is unwarranted, and it lacked $19,404 of paying the fees prescribed by the Act of 1905 under which it filed a copy of its charter and paid $100 (or to be exact, $90.00). It can not be credited with having accepted and complied with the said Act of 1899 in filing the copy of its charter in 1905 and making the payment of $100, since the Act of 1899 was repealed by the Act of April 23, 1901, four years before the filing of such articles and such payment, and four

years before the passage of said Act of 1905, under which the copy of charter was filed and $90.00 paid.

Western Union Telegraph Co. vs. State,
82 Ark., 302.

In each of these cases where it was held that compliance with the statute and payment of the fees constituted a contract that entitled the corporation to enter the State and do business on the same terms as domestic corporations, the law expressly provided that such corporations should be subjected to the same duties and liabilities as domestic corporations of like character, and have no other or greater powers. And in each of them the corporation paid the consideration, the license required for such right.

Neither of the Acts under which appellant claims such a contract contains any such provision. There are not only not any plain, clear and unequivocal terms in either of said Acts granting such right, but it can not even be fairly implied or presumed from them, and appellant has never paid one single cent for such right.

If it can be said by any possible construction of the said Acts of March 31, 1885, and April 4, 1887, that a contract was made with appellant company, authorizing it to do business in the State on the same terms as domestic corporations, nothing whatever was

paid or agreed to be paid the State for such right or franchise, and the contract is void for want of consideration.

As was said in Pearsel vs. Great Northern Ry. Co., 161 U. S., 667:

"The contract protected by this clause must also be founded upon a good consideration. If it be a mere *nude pact*, a bare promise to allow a certain thing to be done, it will be construed as a revocable license."

A license or license tax of the amount specified in Section 3 of the Wingo Act, the same amount as is required of all domestic corporations organizing in the State, by said section, is required to be paid by all foreign corporations seeking to do business in the State. And if compliance with said Act of 1885 be regarded as a contract exempting the telegraph company from the payment of said franchise tax, it is invalid—being without consideration.

In Grand Lodge vs. Louisiana, 166 U. S., 143, the lodge claimed it had a contract under a statute exempting its property from taxation, and that it was not affected by the Constitution adopted later, under which only part of its property was exempt. The court said:

"To make such a contract, however, there is the same necessity for a consideration that there would be

if it were a contract between private parties. If the law be a mere offer of bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expense upon the faith of such offer. Thus the legislature of the State of Michigan, desiring to encourage the manufacture of salt, which had been recently discovered in the Saginaw Valley (in 1859), offered exemption from taxation and a bounty of ten cents per bushel to all individuals, companies or corporations formed for the purpose of boring for and manufacturing salt. It was held in Salt Mfg. Co. vs. East Saginaw, 80 U. S. (13 Wall.), 373, that, if the salt company, plaintiff, had been incorporated by a special charter, containing the provision that its property should be exempt from taxation, and that charter had been accepted and acted upon, it would have constituted a contract; but that this was a bounty offered to *all* corporations and individuals who should manufacture salt, and there was no pledge that it should not be repealed at any time; that as long as it remained a law every individual or corporation was at liberty to avail himself or itself of its advantages by complying with its terms and doing the things which it promised to reward; but was also at liberty at any time to abandon such a course; that it was a matter purely voluntary on both sides—giving to one party the power to abandon the manufacture of salt, and to the other to repeal the exemption from taxation and the bounty of ten cents per bushel. * * * A like ruling was made in Welch vs. Cook, 97 U. S., 541, in which an Act of the legislature of the District of Columbia, exempting from general taxation for ten years such real and personal property as might be employed within the District for manufacturing purposes, did not create an irrepealable contract with the owners of such property, but merely conferred a bounty, liable at any time to be withdrawn."

Continuing, the court said:

"The alleged contract for exemption was not contained in the charter, as in other cases where such exemption has been sustained."

And relief was denied.

This case can not come within the authority of the Dartmouth College case, where it was held that a consideration from the grantees was unnecessary to secure the legal sanctity of the contract raised by a charter granted by the State and accepted by the grantees.

Here there was no charter granted the telegraph company, nor any acceptance by it of any Act or grant. Its claim of exemption from this license tax arises under a general law, whose purpose was not even taxation, much less exemption therefrom, and none of which applied to said telegraph company, a foreign corporation, if the construction of Section 10 (Sec. 7946, Kirby's Digest) of said Act by the Supreme Court of the State of Arkansas, holding that it did not require said company to transmit intrastate messages if it was not authorized to do so, nor engage in intrastate business, may be relied upon as indicating the scope of the Act.

Western Union Telegraph Co. vs. State,
82 *Ark.,* 318.

In Wisconsin and Michigan R. Co. vs. Powers, 191 U. S., 379, the railway company claimed a contract exempting it from taxation under the terms of a law of May 27, 1893 (Sec. 3), which, after levying a specific tax on railroads, provided, "that the rate of taxation fixed by this Act or any other law of this State shall not apply to any railroad company hereafter building and operating a line of railroad within this State north of parallel forty-four of latitude, until the same has been operated for the full period of ten years, unless the gross earnings shall equal $4000.00 per mile, except," etc. A corporation was organized in the State, of which plaintiff was successor, and built a road north of parallel forty-four, and its gross earnings never amounted to $4000.00 per mile. Sustaining a demurrer to the bill, the court said:

"The first and main question, then, is whether the Act of 1893 purported to make an irrevocable contract with such railroad as might thereafter comply with its terms. The question is pretty well answered by a series of decisions of this court. A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprise is pointed out in East Saginaw Salt Mfg. Co. vs. East Saginaw, 13 Wall., 373. In earlier and later cases it was mentioned that there was no counter obligation, service or detriment incurred that properly could be regarded as a consideration for the supposed contract. Christ Church vs. Philadelphia Co., 24 How., 300; Tucker vs.

Ferguson, 22 Wall., 527; Grand Lodge F. & A. M. vs. New Orleans, 166 U. S., 143; Tomlinson vs. Jessup, 15 Wall., 454. But whatever the ground, thus far attempts like the present to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties have failed."

After discussing the question of consideration, saying:

"But the presence or absence of consideration is an aid to construction in doubtful cases—a circumstance to take into account in determining whether the State has purported to bind itself irrevocably, or merely has used words of prophecy, encouragement, or bounty, holding out a hope but not amounting to a covenant."

The court continued:

"But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that in view of the subject matter the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its view of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law. What we have said is

enough to show that in our opinion the plaintiff never had a contract," etc.

In Stanislaus County vs. San Joaquin C. & I. Co., 192 U. S., 201, an action was brought by the irrigating company, incorporated in 1871 under a general Act of the California legislature of 1853 as amended in 1862, that had bought land and built canals and reservoirs costing about a million dollars, against the supervisors of the county to set aside an ordinance made by them on June 24, 1896, under a later law, fixing water rates to be charged by the company for the ensuing year, as in violation of its contract under said Act of 1862, which provided: "Every company organized as aforesaid shall have power, and the same is hereby granted * * * to establish, collect and receive rates, water rents or tolls, which shall be subject to regulation by the board of supervisors of the county or counties in which the work is situated; but which shall not be reduced by the supervisors so low as to yield the stockholders less than one and one-half per cent per month upon the capital actually invested." The court said:

"The question which first arises in this case is whether there was a contract with the company under the Act of 1862, by reason of which the State could not thereafter authorize the board of supervisors to reduce the rates so low as to yield less than one and one-half per cent per month upon the capital actually invested. * * * No special charter was given the

company directly from the legislature otherwise than is contained in the powers granted by the two Acts above named. A company, though organized under a general statute, may nevertheless thereby enter into and obtain a contract from the State which may be of such a nature that it can only be altered in case power to alter was prior thereto provided for in the Constitution or legislation of the State. * * * The language used in conferring power to fix rates in the Act of 1862 is to be taken as if it were contained in a special charter granted by the legislature to this company. The question then arises whether language such as is contained in the third section of that Act * * * amounts to a contract to be protected by the Constitution of the United States? We think it does not. * * * There is no promise made in the Act that the legislature would not itself subsequently alter that authority. * * * In order to make such a contract, the language must be plain and susceptible of no other reasonable construction. Freeport Company vs. Freeport City, 180 U. S., 587; citing Railroad Commission cases, 116 U. S., 307, 325."

The opinion quotes from the case of Wisconsin and M. Ry. Co. vs. Powers, 191 U. S., 379, already cited.

In St. Louis vs. United Railways Co., 210 U. S., 266, the United Railways, lessor, and the lessees of a large system of street railways in St. Louis, attempted to enjoin the enforcement of Ordinance No. 21,087, alleging violation of the contract clause of the Constitution and of rights secured by the Fourteenth Amendment. The special city ordinances granted to the

particular companies, of which plaintiffs were successors, rights in certain streets—"to operate, maintain and construct,"—"to lay down, construct, operate and maintain,"—"to reconstruct its tracks and maintain and operate its tracks thereon"—in consideration that the streets should be graded, the portion between the tracks kept in repair, the roads completed in a definite time, cars run at certain intervals, and the payment of certain stipulated sums of money or certain percentages of the gross earnings of the several companies to the city each year during the continuance of the privileges specified in the contract. At the time the charters were granted there was a valid ordinance in force requiring the street railway companies to pay to the city collector an annual license fee of $25.00 for each and every car used by them in transporting passengers for hire in the city. Said Ordinance 21,087, challenged, increased this license tax from $25.00 per car to a tax equal to one mill for each pay passenger on each car. The court said:

"The theory then, upon which the bill was framed and this case decided, was that the city, having once fixed a price for the use of its streets, which the railway companies had agreed to pay, there was no right to impose a license tax upon the railway companies under the ordinance of March 5, 1903 (No. 21,087), amending the municipal code in the manner already referred to. * * * These sections of the municipal

code requiring the payment of the license fee impose a tax, as the main purpose of their enactment is the raising of revenue. City of St. Louis vs. Spiegel, 75 Mo., 145, 146. The principles involved in this case have been the subject of frequent consideration in this court, and while it can be no longer doubted that a State, or municipal corporation acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principle has been established that such deprivation can only follow when the State or city has concluded itself, by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption. * * * An examination of the cases in this court shows that it is not sufficient that a street railway company has agreed to pay for the privilege of using the streets for a given time, either in a lump sum or by payments in installments, or percentages of the receipts, to thereby conclude the municipality from exercising a statutory authority to impose license fees or taxes. This right still exists unless there is a distinct agreement, clearly expressed, that the sums to be paid are in lieu of all such exactions. * * *

"A leading case is New Orleans City & Lake Railroad Co. vs. New Orleans, 143 U. S., 192. In that case the City of New Orleans, on October 2, 1879, sold to the New Orleans City Railroad Company, assignor of the plaintiff, for the price of $630,000, the right of way and franchises for running certain lines of railroad for carrying passengers within the city, for the term of twenty-five years, and the company agreed to construct its railroad, to keep the streets in repair, to comply with the regulations as to the style and running of cars, rates of fare and motive power, and to annually pay into the city treasury, upon the assessed value of the road and fixtures, the annual tax levied upon the real estate, the value of the road and fixtures

to be assessed by the usual mode of assessment; and the city bound itself not to grant, during the period for which the franchises were sold, a right of way to any other railroad company upon the streets where their right of way was sold, unless by mutual agreement between the city and the purchaser or purchasers of the franchises.

"Afterwards, in the year of 1887, under authority of a legislative Act, the city imposed a license fee upon the business of carrying on, operating and running a horse or steam road for the transportation of passengers within the limits of the city, payable annually, and based on the annual gross receipts—when the same exceeded $500,000, the amount to be $2500. The railroad company admitted its receipts exceeded that sum, and claimed the protection of the Constitution of the United States for its franchise contract extending to January 1, 1906, as above set forth.

"This would seem to be as strong a case for the exemption from the license tax as could be made, short of a specific agreement binding the city not to exercise its power in that direction. This court affirmed the judgment of the Supreme Court of Louisiana denying the contention of the railroad company. * * * It seems to us that this case is virtually decided by the rule laid down in Ry. vs. New Orleans, 143 U. S., 192, *supra*, which holds that because a street railway company has agreed to pay for the use of the streets of the city, for a given period, it does not thereby create an inviolable contract which will prevent the exaction of a license tax under an acknowledged power of the city, unless this right has been specifically surrendered in terms which admit of no other reasonable interpretation. We are of the opinion * * * that these ordinances do not contain any clearly expressed obligation on the part of the city surrendering its right to impose further license fees or taxes upon street railway cars."

Each of these cases presents a stronger claim of contract than the case at bar, but the claim was denied in all of them.

Appellant to sustain its claim relies upon the following cases, all of which construe statutes making special provisions for particular corporations, and no one of which construes a statute of this kind, nor furnishes authority in support of its contention.

Counsel insist that Erie Railroad Co. vs. Penn., 153 U. S., 628, is conclusive of this case, although it is in no respect like it. There the State of Pennsylvania passed special Acts in 1841 and 1846 giving the N. Y. and Lake Erie Railroad Company authority to construct its road through a portion of two counties, and prescribed maximum rates for carrying coal, required the payment annually into the State treasury of $10,000, and provided that certain of its stock should be subject to taxation by the State and for other taxes, etc. Under this authority the company constructed and maintained forty-two miles of its road. In 1885 the State tried to impose on said company the duty—when paying *in the City of New York* the interest due upon script, bonds or certificates of indebtedness held by residents of Pennsylvania—of deducting from the interest so paid the amount assessed upon bonds and moneyed capital in the hands of such residents of

Pennsylvania. The court held the Act of 1885 impaired the obligation of the contract, and said:

"We are of the opinion that the fourth section of the Act of 1885, in its application to this railroad company, impairs the obligation of the contract between it and Pennsylvania, as disclosed by the Acts of 1841 and 1846, and by what was done by that company upon the faith of those Acts. These Acts prescribe the terms and conditions upon which Pennsylvania assented to the company's constructing and operating its road through limited portions of its territory. * * * Consistently with these terms and conditions, Pennsylvania can not withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the Acts of 1841 and 1846, except such as the State, in the exercise of its police powers, for purposes of taxation, and other public objects, may legally impose in respect to business carried on and property situated within its limits. * * * The road having been constructed in that State upon the faith of the legislation of 1841 and 1846, and with the assent of the State given, for a valuable consideration paid by the company, its maintainance in Pennsylvania can not be made the pretext for imposing such conditions as those prescribed in the Act of 1885. * * * It assumes to do what the State has no authority to do, to compel a foreign corporation to act, *in the State of its creation*, as an assessor and collector of taxes due in Pennsylvania from residents of Pennsylvania."

In Walla Walla vs. Walla Walla Water Co., 172 U. S., 1, the city made a formal grant by ordinance of a

franchise and use of streets, highways and alleys to the particular water company to lay water mains for purpose of furnishing water to the inhabitants of the city, providing terms and prescribing compensation, which ordinance was formally accepted by the company and substantially complied with. It furnishes no analogy to the case at bar and is in nowise similar to it.

U. S. vs. Central Pac. R. R. Co., 118 U. S., 235, is a case construing statutes granting aid to and under which bonds were issued by the government to assist in constructing the railroad, and providing for the payment of the bonds by the government retaining all compensation due from it to the railroad for transportation services rendered the government. The court held, following its construction of expressions substantially the same in other statutes, that the government was entitled to retain the compensation due from it to the railroad for transportation services rendered on that part only of the line that had been assisted in construction by the government subsidy.

City Ry. Co. vs. Citizens Street R. Co., 166 U. S., 568, is a case of grant of franchise by ordinance for thirty years to a particular street railway company, which was duly accepted and complied with, and an extension of the franchise by ordinance, upon the ap-

plication of the company, to thirty-seven years. The company, after the passage of the extension ordinance, sold out to another company, and the sale was approved by ordinance of the city, and $300,000 in bonds issued, and later the new company was given authority to change to electric motive power. Court held under the circumstances that the negotiations of the new loan operated against the city as an estoppel, and that the continued operation of the road was a sufficient consideration for the "extension of the charter or franchise," saying:

"But however this may be, it seems to us that the continued operation of the road may itself be regarded a sufficient consideration for the extension of the franchise. The extension was not a mere gratuity or bounty within the case of Grand Lodge F. & A. Masons vs. New Orleans, 166 U. S., 143."

In St. Louis vs. Western Union Tel. Co., 148 U. S., 103, the W. U. Tel. Co. sought to enjoin the city from collecting a tax or rental of $5.00 a pole for each telegraph pole erected in streets or on public grounds of the city, in accordance with city ordinance of March 22, 1884, amending Ordinance 11,604, made February 25, 1881. Said Ordinance 11,604 authorized telegraph companies to set poles and fixtures along and across streets and public roads, etc., subject to prescribed regulations, and the company claimed to have complied

with it; but proof showed it was engaged in telegraph business in the city fifteen years before passage of the ordinance. The court denied the relief asked, and used the language quoted in appellant's brief distinguishing it from the case of New Orleans vs. Great Southern Tel. Co., 40 La. Ann., 41, where the telephone company had set its poles and constructed its lines under and by virtue of the grant made by the ordinance; and hence the conditions named therein were held part of the contract between the city and the telephone company, which the former was not at liberty to disregard.

In Monongahela Nav. Co. vs. United States, 148 U. S., 327, there was no question whatever of a contract with the State. The State of Pennsylvania had incorporated and granted to the Monongahela Navigation Company a franchise to improve the Monongahela river for navigation and take tolls thereon. The United States undertook to condemn and appropriate lock and dam No. 7 in said river belonging to said company, and the court held that the franchise to take tolls should be considered in estimating the sum to be paid for the property, notwithstanding the Act of Congress directing the condemnation provided, "That in estimating the sum to be paid by the United States,

the franchise of said corporation to collect tolls shall not be considered nor estimated."

Pearsel vs. Great Northern R. Co., 161 U. S., 661, was a suit by a stockholder of the Great Northern R. Co., organized under an Act of the legislature of Minnesota to incorporate the Minneapolis and St. Cloud Railroad Company, to enjoin it from consolidating with the Northern Pacific Ry. Company. The case turned upon the question whether the right given by its charter to the Minneapolis and St. Cloud Railroad Company (afterwards named the Great Northern) to connect with any railroad running in the same general direction, and by a subsequent amendatory Act to consolidate its capital stock or its property, road or franchise, with those of any other railroad, could be taken away by a subsequent Act inhibiting the consolidation, lease or purchase, by any railroad, of the stock, property or franchise of any parallel or competing line; and the court held that it could be.

In Powers vs. Detroit and Grand Haven Ry. Co., 201 U. S., 544, it was claimed that a contract was made by Section 9, Act 1885, a special Act, which provides that the company shall pay "an annual tax of one per cent on the capital stock of said company paid in, *which tax shall be in lieu of all other taxes*, except for penalties imposed upon said company by its act of

incorporation or any other law of this State." Distinguishing this case from Ry. vs. Powers, 191 U. S., 379, the court said:

"But the difference between that case and this is obvious. That arose on a general law in respect to taxation; this, on a provision in a special Act having reference to a particular corporation—an Act which called for and received acceptance by the corporation. * * * Surely no clearer case of contract can be presented than one in which a legislature passes an Act in respect to a particular corporation, making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation, and the completion of an unfinished road, whose completion is deemed of great public importance, and where the special provision is, as required, formally accepted, the expenditures made and the road completed."

THE ACT DOES NOT DISCRIMINATE AGAINST APPELLANT, NOR DENY IT THE EQUAL PROTECTION OF THE LAW.

The appellant came into and established itself in the State "thirty or forty years ago" with the consent of the State. It had the right to engage in interstate commerce and the service of the government, free from regulation or restriction by the State, and permission of the State to engage in intrastate commerce, which permission could be withdrawn at any time at the State's pleasure as it changed its policy of comity. It

could purchase the privilege of engaging in intrastate commerce upon like terms with corporations of the State of like character, and make a valid contract therefor by accepting the terms of sale of such privilege or franchise prescribed by the State, and paying the price demanded. It enjoyed this privilege free for years; knew that its tenure was by sufferance; has persistently refused to pay for it, although the State has more than once demanded that it should do so; and now claims to have acquired the right by prescription.

It came into the State charged with a knowledge of the law and its rights thereunder. It came without invitation or inducement offered by the State. By Act of the legislature in 1899 the State withdrew the permission to do business without charge, and said, "You shall pay for it the same as my domestic corporations." It refused to comply with this Act, which was repealed in 1901; and the State has again withdrawn the permission by the Wingo Act herein, and it still refuses to comply with the Act and pay for the right the same price that is prescribed for domestic corporations organizing to do such business. The State is not attempting to take from appellant any of its property, the right of way, or any thing else acquired by it under the Act of 1885—is not depriving

the company of any of its rights by this Act—but only saying to it: "You can no longer enjoy this valuable right of mine—the right to do intrastate business—free. You shall pay the price asked or forego it." The company, not having accepted the terms and paid the fees of this or any other Act making terms, is as much a foreign corporation of the State as if it had never sent an intrastate message, raised a pole or strung a wire in the State of Arkansas. There can be no discrimination, so far as it is concerned, by this Act.

The appellant is not a citizen within the meaning of the Constitution; and so far as local non-governmental business is concerned, it, the Western Union Telegraph Company, is not a person within the jurisdiction of the State, unless and until it complies with the law and obtains permission to come into the State.

Blake vs. McClung, 172 *U. S.*, 239, 261.

We admit, as counsel claims, that the telegraph is a great factor in the development and spread of civilization and progress of the world; that the service of appellant is indispensable to the government and to interstate commerce; also its marvelous development, covering the State and the United States, and with its connections extending to the remote corners of the

earth. It feels power and forgets right. But after all, so far as the State of Arkansas is concerned, it is but a foreign corporation, one that has enjoyed all the benefits and protection of the laws of the State, and has persistently refused to comply with the conditions and terms laid down by it for foreign corporations seeking to do business within its borders.

It is applying for admission, and objects that the fee is great. The fee is great only because the company is great. It is the same fee charged by the State to its own corporations, and appellant is without right to object to any terms the State may see fit to prescribe.

It has utterly failed to show it had a contract with the State authorizing it to enter and do business here; and it is singular, if it thought it had such contract, that it failed to plead it in Western Union Tel. Co. vs. State, *infra;* and that it also neglected to allege it in No. 408, herein.

But concede for the argument, that it has a contract under said Act authorizing it to enter the State and do business within it, upon what terms could it do such business? None are laid down in the Act, and it established itself in the State fifteen years before it was passed. It does not claim to have complied with

any Act with terms providing that a compliance with it should authorize the corporation to do business within the State upon the same terms "as like corporations of this State." The Constitution provides:

"Foreign corporations may be authorized to do business in this State under such limitations and restrictions as may be prescribed by law. Provided, that no such corporation shall do any business in this State except while it maintains therein one or more known places of business and an authorized agent or agents in the same upon whom process may be served; *and as to contracts made or business done in this State,* they shall be subject to the same regulations, limitations and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges or franchises than may be exercised by like corporations of this State, nor shall they have power to condemn or appropriate private property."

Sec. 11, *Art.* 12, *Constitution.*

This provision was part of its contract, and it could only do business under such contract "under such limitations and restrictions as may be prescribed by law," and the "Wingo Act" fixes the limitations and prescribes the conditions, and it is bound by the terms of its contract to the performance of them, without regard to whether the same limitations are imposed upon domestic corporations or not. The provision, "*and as to contracts made and business done in this State,* they shall be subject to the same regulations," etc., "as like corporations of this State," can

not be applied to its contract with the State; for it can not be presumed that the State would limit its legislature, after giving it plenary power to fix terms, to making only such terms for foreign corporations coming in as are made for corporations organizing here. The legislature had all the power given it by the Constitution to amend appellant's contract to do business in the State, and change it to the terms of any Act it might pass authorizing foreign corporations to do business in the State, in accordance with the terms of its said contract of which this section of the Constitution is a part.

Under Sec. 6 of Art. 12 of the Constitution the legislature has power to repeal or alter the general laws under which corporations are organized, and to alter, revoke or annul any charter existing or that may be created, and it has the same power over foreign corporations.

Western Union Tel. Co. vs. State,
82 *Ark.*, 318.

Woodson vs. State, 69 *Ark.*, 527.

Ry. vs. Paul, 64 *Ark.*, 86.

173 *U. S.*, 404.

Railway vs. Leep, 58 *Ark.*, 89.

We think that under a proper construction of the Act, it does not discriminate against foreign cor-

porations duly authorized to do business in the State, nor deny them the equal protection of the law; but appellant's standing does not seem to require that that question should be gone into further.

The learned trial judge evidently fell into error in confusing the facts of another case (The Chicago, Rock Island and Pacific vs. Ludwig) before him at the same time, and upon the reasons in the opinion therein overruled the demurrer in this cause, although the allegations in the bill herein are altogether dissimilar.

The statute is valid, and the judgment in the first suit, No. 408, should be affirmed; and the judgment in No. 233 should be reversed, and finally the demurrer sustained, and the bill dismissed.

Respectfully submitted,

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For the State of Arkansas.

LUDWIG, SECRETARY OF STATE OF ARKANSAS, *v.* WESTERN UNION TELEGRAPH COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 45. Argued April 13, 14, 1909.—Decided February 21, 1910.

On the authority of *Western Union Telegraph Company* v. *Kansas*, *ante*, p. 1, and *Pullman Car Company* v. *Kansas*, *ante*, p. 55, held that:

A state statute which requires a foreign corporation engaged in interstate commerce to pay, as a license tax or fee for doing intrastate business, a given amount on its entire capital stock whether employed within the State or elsewhere, directly burdens the interstate business of such corporation and its property outside the jurisdiction of the taxing State and is unconstitutional and void; and so held as to the Wingo law of Arkansas of May 13, 1907.

Publication by proclamation by a state officer in his official capacity that a foreign corporation engaged in interstate and local business is not authorized, but is forbidden from continuing, to do local business would produce irreparable injury to such corporation; and, in order to prevent such contemplated or threatened injury a court of equity may enjoin the state officers from issuing such proclamation, if the state statute on which the contemplated action is based is unconstitutional.

An action brought by a corporation against a state officer to obtain such an injunction is not an action against the State within the meaning of the Eleventh Amendment. *Western Union Telegraph Company* v. *Andrews*, *post*, p. 165.

THE facts which involve the constitutionality of certain provisions of the Wingo Act of Arkansas applicable to foreign corporations are stated in the opinion.

Mr. Hal L. Norwood, Attorney General of the State of Arkansas, with whom *Mr. Joseph M. Hill*, *Mr. William F. Kirby* and *Mr. Otis T. Wingo* were on the brief for appellant in this case and for appellee in No. 8, argued simultaneously herewith.[1]

A State has plenary power to prescribe such terms as pleases it upon which foreign corporations may enter and do business.

[1] For decision in No. 8, see p. 165, *post*.

It has power to refuse admission to a foreign corporation not engaged in interstate commerce or governmental service, and to prescribe terms upon which a foreign corporation engaged in interstate commerce and the service of the Government may do intrastate business. It has the power to prevent a foreign corporation from doing business at all within its borders, unless such prohibition is so conditioned as to violate the Federal or its own Constitution. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *American Smelting Co.* v. *Colorado*, 204 U. S. 103; *Security Life Ins. Co.* v. *Prewett*, 202 U. S. 246; *Hooper* v. *California*, 155 U. S. 648; *Allgeyer* v. *Louisiana*, 165 U. S. 578; *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Kehrer* v. *Stewart*, 197 U. S. 60; *State* v. *Lancashire Ins. Co.*, 66 Arkansas, 466; *Woodson* v. *State*, 69 Arkansas, 528; *Western Union Tel. Co.* v. *State*, 82 Arkansas, 302; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *John Hancock M. Life Ins. Co.* v. *Warner*, 181 U. S. 73.

It may prescribe as such condition a forfeiture of its right to do business upon removal of a cause to the Federal court or the bringing of suit in the Federal court without the consent of the opposite party. *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535; and see *Security M. Life Ins. Co.* v. *Prewett*, 202 U. S. 246, holding a statute valid that prescribed such forfeiture in the exact terms of the Wingo Act.

The court was without jurisdiction, this being a suit against the State.

The act fixes a license fee or tax to be paid by foreign corporations to the State for its privilege or franchise of allowing such corporations to do business within the State upon the same terms and conditions as domestic corporations.

The penalty suits by the State's prosecuting attorneys in its courts, for the collection of its said license tax for its benefit, is its method of enforcing the payment of same. The State is the real party in interest against which the relief in these cases

is asked and the judgments would operate. These suits are brought to test the constitutionality of the statute,—not to prevent a trespass of individuals against its property. *In re Ayers*, 123 U. S. 443, 487; *Fitts* v. *Magee*, 172 U. S. 516, 528, and cases reviewed in the opinion below. See *Western Union Tel. Co.* v. *Andrews*, 154 Fed. Rep. 95. *Ex parte Young*, 209 U. S. 124, is not applicable.

The Wingo Act is not in violation of the Telegraph Company's rights under act of Congress of 1866, nor an interference with interstate commerce.

The terms "seeking to do business in this State" and "doing business in this State" mean and include only intrastate business, for such only has the State power to regulate. *Western Un. Tel. Co.* v. *State*, 82 Arkansas, 309, 321, and cases cited. And see also *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Co.* v. *Adams*, 189 U. S. 420.

Like expressions in statutes of North Carolina and Georgia have been similarly construed and the cases affirmed by this court. *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Kehrer* v. *Stewart*, 197 U. S. 60. Other cases in point are: *State* v. *Telegraph Co.*, 27 Montana, 394; *State* v. *Wagner*, 77 Minnesota, 483; *Western Union Tel. Co.* v. *State*, 90 Pac. Rep. (Kans.) 307; *Commonwealth* v. *Gagne*, 153 Massachusetts, 205; cited in 188 Massachusetts, 241; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196; *Norfolk & Western Ry. Co.* v. *Pennsylvania*, 136 U. S. 114.

The expression, "now or hereafter doing business in this State," and others of like import, as "do any business in this State," etc., having received a judicial interpretation, are presumed to be used in that sense in this act, there being nothing in the act to indicate a contrary intent. *Beasley* v. *Equitable Securities Co.*, 72 Arkansas, 610.

When the legislature adopts the statute of another State the interpretation of such statute by the courts of that State is adopted with it, and how much the more should our own court's construction of an act reënacted be conclusive in its

interpretation. *Nebraska Nat. Bank* v. *Walsh*, 68 Arkansas, 438; *McNutt* v. *McNutt*, 78 Arkansas, 352.

Kirby's Digest, § 7946, is part of the act (§ 10) of March 31, 1885, under the terms of which the company claims to have contracted with the State for the right to do intrastate business, and the Supreme Court of the State says the act does not even apply to a company not authorized to do intrastate business. Such is the construction of this statute by the Supreme Court of the State of Arkansas, and it is binding here. *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226; *Kehrer* v. *Stewart*, 197 U. S. 60; *Pullman Co.* v. *Adams*, 189 U. S. 426; *Osborne* v. *Florida*, 164 U. S. 650.

The act is not in violation of the Telegraph Company's contract with the State, nor does it deprive it of its property without due process of law.

This law was passed by the State to enable her citizens to enforce without great inconvenience their just demands against foreign corporations doing business in this State under the comity existing between the States. See *Conn. Mut. Life Ins. Co.* v. *Spratley*, 172 U. S. 621; *Am. Smelting Co.* v. *Colorado*, 204 U. S. 103, distinguished.

Mr. Rush Taggart and *Mr. Henry D. Estabrook*, with whom *Mr. George B. Rose* was on the brief, for appellee in this case and appellant in No. 8, argued simultaneously herewith.[1]

By discriminating between foreign and domestic corporations, the statute complained of denies to the Telegraph Company the equal protection of the law.

While a State may, if it sees fit to do so, exclude from its territory any foreign corporation not engaged in interstate commerce or in the service of the United States, if the State does admit the corporation within its borders, it is then a person entitled to the protection afforded by the Fourteenth Amendment. *Blake* v. *McClung*, 172 U. S. 239.

[1] For decision in No. 8, see p. 165, *post*.

When foreign corporations have entered a State with its permission, and made permanent investments therein, they cannot be discriminated against in favor of domestic corporations. To do so would be to deny them the equal protection of the law. *American Smelting Co.* v. *Colorado*, 204 U. S. 103.

The act forbids a foreign corporation to bring suit in the United States courts, and forfeits its right to do business in the State in the event of its instituting such an action, while it contains no restriction upon the right of domestic corporations to sue in those courts. This is a valuable right conferred by Congress, in pursuance of the authority of the Constitution of the United States, of which the State cannot deprive a citizen or a corporation. *Insurance Co.* v. *Moore*, 20 Wall. 425; *Barron* v. *Burnside*, 121 U. S. 180; *So. Pac. Ry. Co.* v. *Denton*, 146 U. S. 200; *Martin* v. *R. R. Co.*, 151 U. S. 673; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100.

The equal protection of the law is a pledge of the protection of equal laws. *Yick Wo* v. *Hopkins*, 118 U. S. 369.

The act violates the contract between the State and the Telegraph Company and deprives the latter of its property without due process of law.

A contract existed under the Arkansas act of March 31, 1885, Acts, p. 176, with the terms whereof the Telegraph Company has complied. See *United States* v. *Central Pacific Railroad Co.*, 118 U. S. 235; *St. Louis* v. *Western Union Tel. Co.*, 148 U. S. 103; *New Orleans* v. *Southern Telephone and Telegraph Co.*, 40 La. Ann. 41; *Monongahela Co.* v. *United States*, 148 U. S. 329; *Montgomery County* v. *Bridge Co.*, 110 Pa. St. 54, 68; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *Pearsal* v. *Great Northern Railway Co.*, 161 U. S. 661; *City Railway Co.* v. *Citizens' Railroad Co.*, 166 U. S. 587; *Powers* v. *Detroit & Grand Haven Railway Co.*, 201 U. S. 544.

The fact that no money was paid to the State does not make the contract void for want of consideration. *Dartmouth College* v. *Woodward*, 4 Wheat. 637; *Erie Railroad Co.* v. *Pennsylvania*, 153 U. S. 628.

The act infringes the rights conferred on the Telegraph Company by the act of Congress of July 24th, 1866, as an agency of the United States Government and as an instrumentality of commerce.

The Telegraph Company under that act, is an instrumentality of the Government of the United States, which a State cannot exclude from its borders and such Telegraph Company is likewise an instrumentality of interstate commerce, the exclusive power to regulate which is vested in the Congress of the United States. *Pensacola Telegraph Company* v. *W. U. Tel. Co.*, 96 U. S. 1; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *W. U. Tel. Co.* v. *Massachusetts*, 125 U. S. 530; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *W. U. Tel. Co.* v. *Penna. R. R. Co.*, 195 U. S. 540; *W. U. Tel. Co.* v. *St. Louis*, 148 U. S. 92.

Even if the act be thus interpreted by the state authorities, as applying only to domestic business it cannot be sustained under *Osborne* v. *Florida*, 164 U. S. 650; *Pullman Company* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullman Palace Car Co.*, 191 U. S. 171; *New York* v. *Penna. R. R. Co.*, 192 U. S. 21, as in those cases, the acts sustained by this court either expressly separated the local business of the companies affected from the interstate business, and left it optional with the company affected, to continue its domestic business, or to discontinue it, or the act had been so interpreted by the courts of the State, and this court simply accepted such construction of the act as made by the state courts. To the same effect: *The Trade-Mark Cases*, 100 U. S. 82; *James* v. *Bowman*, 190 U. S. 127.

Mr. Justice Harlan delivered the opinion of the court.

The Western Union Telegraph Company, a corporation of New York, doing business, both interstate and intrastate, in Arkansas, as it had done for many years, brought this suit against O. C. Ludwig, Secretary of State of Arkansas, for the purpose of obtaining a decree that the statute of that State of May 13th, 1907, entitled "An Act to permit foreign corpora-

tions to do business in Arkansas and fixing fees to be paid by all corporations," Acts of Ark., 1907, p. 744, was unconstitutional, null and void, and enjoining the defendant, in his official capacity, from attempting to revoke, or proclaiming through official newspaper publications that he had revoked, the authority of the plaintiff to do business in Arkansas, or that it had no right to continue doing business in that State. The plaintiff, in its bill, asked such other and further relief as the case might require and as might seem just.

A temporary injunction was issued, and thereafter the defendant demurred and answered at the same time. The demurrer was on these grounds: That the court was without jurisdiction to hear and determine the case, "the same being in effect a suit against the State" by a citizen of another State to prevent the enforcement of one of its criminal or penal statutes; that the facts stated in the bill are not sufficient to constitute a cause of action nor to warrant the relief asked; and that the bill was wholly without equity. The answer denied all the material allegations of the bill.

Subsequently, the plaintiff, by leave of the court, filed an amendment of its bill. To that amendment no answer was made, but all parties being present, the cause was heard, without objection, on the demurrer to the bill. The demurrer was overruled, and the defendant having elected not to plead further, the injunction previously granted was made perpetual. From that order the present appeal was prosecuted.

The above statute, known as the Wingo Act, whose constitutionality is questioned by the plaintiff, is as follows (the italics being ours):

"§ 1. Every company or corporation incorporated under the laws of any other State, Territory or county, including foreign railroad and foreign fire and life insurance companies, *now or hereafter doing business in this State*, shall file in the office of the Secretary of State in this State a copy of its charter or articles of incorporation or association, or a copy of its certificate of incorporation, duly authenticated and certified by the

proper authority, together with a statement of its assets and liabilities and the amount of its capital employed in this State, and shall also designate its general office or place of business in this State, and shall name an agent upon whom process may be served. *Provided*, before authority is granted to any foreign corporation to do business in this State, it must file with the Secretary of State a resolution adopted by its board of directors, consenting that service of process upon any agent of such company in this State, or upon the Secretary of State of this State, in any action brought or pending in this State, shall be a valid service upon said company; and if process is served upon the Secretary of State it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this State, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this State in any Federal court, it shall be the duty of the Secretary of State to forthwith revoke all authority to such company and its agents to do business in this State, and to publish such revocation in some newspaper of general circulation published in this State; and if such corporation shall *thereafter continue to do* business in this State, it shall be subject to the penalty of this act *for each day* it shall continue to do business in this State after such revocation.

"§ 2. Any foreign corporation *which shall fail to comply with the provisions of this act*, and shall do *any* business in this State, shall be subject to a fine of not less than $1,000, to be recovered before any court of competent jurisdiction, and all such fines so recovered shall be paid into the general revenue fund of the county in which the cause of action shall accrue, and it is hereby made the duty of the prosecuting attorneys to institute said suits in the name of the State, for the use and benefit of the county in which the suit is brought, and such prosecuting attorney shall receive as his compensation one-fourth of the amount recovered, and as an additional penalty, any

foreign corporation which shall fail or refuse to file its articles of incorporation or certificate as aforesaid, cannot make *any contract in this State which can be enforced by it either in law or in equity*, and the complying with the provisions of this act after suit is instituted shall in no way validate said contract.

"§ 3. That all corporations hereafter incorporated in this State and *all foreign corporations seeking to do business in this State*, shall pay into the treasury of this State *for the filing of said articles* a fee of $25 *where the capital stock is* $50,000 or under; $75 where the capital stock is over $50,000 and not more than $100,000; and $25 additional for each $100,000 of capital stock.

"Any foreign mutual corporation having no capital stock shall be required to pay to the Secretary of State for filing its articles of incorporation the sum of $500. *Provided, however*, nothing in this section shall apply to fraternal orders that write insurance.

"§ 4. That Act 185, approved April 17, 1907, and entitled 'An Act to provide a manner in which foreign corporations may become domestic corporations and for other purposes,' and all laws and parts of laws in conflict herewith, be and the same are, hereby repealed; and that this act take effect and be in force from and after its passage." Acts of Ark. 1907, p. 744.

As the case was decided on demurrer to the bill, the material facts properly alleged are to be taken as true on this hearing. The case made by the plaintiff in its bill is substantially as will be now outlined.

The Telegraph Company was organized in 1851, and immediately thereafter began the work of constructing and operating telegraph lines. Its system extended throughout the United States and Canada, and connected with lines in Mexico and Central and South America by means of submarine cables, and with telegraph systems of foreign countries.

Among the lines so constructed and forming a component part of the company's system and connecting with its main office in New York, are lines within Arkansas, most of which

were constructed since 1867, in which year the company accepted the terms and conditions of the act of Congress of July 24th, 1866, entitled "An act to aid in the construction of telegraph lines and to secure to the Government the use of the same for postal, military and other purposes." 14 Stat. 221, c. 230; Rev. Stat., §§ 5263 to 5269 *inclusive*.

It should be stated in this connection that the bill alleges that the company's lines within Arkansas are upon the public domain and upon the military and post roads of the United States, are part of the postal routes and postal establishment of the United States, and as such the complainant has under the Constitution and laws of the United States the power and is under obligation to transmit all messages for the Government and for the public generally as much and as fully with respect to messages between points within the said State as interstate messages. The company's lines within Arkansas were constructed with the consent and permission of the State, certainly without objection on its part, and in accordance with its laws. The amount which the company, up to the bringing of this suit, had invested in lines within Arkansas was $153,000 and continuously since their construction the Telegraph Company has used them "for the transmission of telegraph messages for the Government of the United States, and the several departments thereof, *and for the public*, as an instrumentality of the Postal Department and *of commerce wholly within the State of Arkansas*, and also for interstate commerce and commerce between points in said State and foreign countries, and thus said telegraph lines have been continuously employed in domestic, interstate and foreign commerce since their construction."

The above act of 1907 requires that every foreign corporation doing or seeking to do business in the State should file in the office of the Secretary of State a copy of its charter or articles of incorporation, duly authenticated, together with a statement of its assets and liabilities and the amount of its capital employed in the State, and designate its general office

or place of business therein, and the name of an agent upon whom process in any action brought or pending in the State may be served. The company tendered to the Secretary of State a duly authenticated copy of a resolution of the Board of Directors, assenting to the designation of an agent upon whom process against the company might be served; also, the above required statement; "and offered to the Secretary of State [who claimed to proceed under the above act of 1907] all reasonable fees for the filing and recording of the said papers." But the Secretary of State refused and still refuses to *file the same* unless the Telegraph Company pays to him a fee of $75 upon the first $100,000 of its capital stock, and $25 upon each additional $100,000 of stock. The capital stock of the Telegraph Company being $100,000,000, the sum which the Secretary required to be paid as a condition of the company's right to have its articles of incorporation filed, and thereafter to continue doing business within Arkansas without incurring the penalties prescribed by the statute, was $25,050.

We have seen that the act of 1907 provided that if any foreign corporation, without the consent of the other party to any suit brought by or against it in any state court should remove such suit to the Federal court, or institute a suit against a citizen of Arkansas in the Federal court, it became the duty of the Secretary of State to forthwith revoke all authority in the company and its agents to do business in Arkansas and publish such revocation in some newspaper of general circulation in the State; and if after such revocation the company continued to do *any* business in Arkansas it became subject to a fine of not less than $1,000 *for each day* it so continued, to be recovered by suits instituted by prosecuting attorneys in the name of the State for the use and benefit of the county in which the suit was brought; so, if the company failed to comply with any of the provisions of the act it became subject to a fine of $1,000; further, if a foreign corporation failed or refused to file its articles of incorporation, as required, it could not "make any contract" in Arkansas "which can be enforced

by it either in law or in equity." Before the bringing of this suit the company had, in fact, instituted a suit in the United States Circuit Court to enjoin the prosecuting attorneys in the several districts of the State from proceeding against it to recover the penalties set forth in the act in question—the suit of *Western Union Telegraph* v. *Andrews &c.*, this day decided, see p. 165, *post*.

It is alleged, and the demurrer admits, that the Secretary of State has threatened to promulgate, and, unless restrained by order of court, will promulgate, a proclamation that the authority of the company to do business in Arkansas has been revoked and publish the fact of such revocation in the newspapers, thereby making it appear that the company had become subject to the prescribed penalties to be recovered in suits brought by the State's prosecuting attorneys, and incapacitated, if the statute be enforced against it, to make any contract in Arkansas, whatever its subject-matter, which is enforcible in law or equity.

The special grounds upon which the statute in question is alleged to be unconstitutional and void may be thus summarized:

1. It imposes upon the Secretary of State the duty—in the event the company instituted a suit in the Federal court against a citizen of Arkansas, or removed to the Federal court, without the consent of the other party, any suit brought by or against it in any court of the State—to forthwith revoke its authority to do business within Arkansas, and subjects the company to the penalty of $1,000 for each day's continuance of such business in the State after such revocation.

2. If the company fails to file a copy of its articles of incorporation with the Secretary of State, and does not pay, in advance of such filing, the required fee or tax, based on its *capital stock*, which represents its property and business everywhere, inside and outside of the State, it is made liable to a fine of $1,000 for continuing, after such failure, to do business in Arkansas.

3. As the lines established by the company in Arkansas are

practically of no value unless used as the same have been located and constructed, any provision that would prohibit their being used for the purposes and as the same were constructed and designed to be used would deny it the equal protection of the laws and deprive it of its property without due process of law.

4. The State lays an unequal burden on the plaintiff as compared with corporations of Arkansas, in that domestic corporations, organized and existing at the time of the passage of the statute, are not required to pay into the treasury of the State any sum whatever upon their capital stock, but are allowed to continue their business without the payment of any sum; while corporations of other States, even those having lines within the State, under the protection thereof, are required to pay a large tax measured by their *entire capital stock, wherever employed*, for the privilege of continuing in Arkansas their established and existing business, whether the same be domestic or foreign commerce.

5. Upon the failure of the company to pay the required fee, based on its capital stock employed both within and without the State, the company is forbidden, or is not allowed, to make any contract within the State, which can be enforced either in law or equity, whether the same relates to domestic, interstate or foreign commerce; whereby, it is alleged, the statute denies to the company the equal protection of the laws, and seeks to enforce an illegal exaction for the privilege of using its property for purposes of domestic, interstate and foreign commerce.

6. As the company originally—some thirty or forty years ago—entered the State of Arkansas and constructed and has operated its lines of telegraph, with the consent of the State, and during that period has extended and operated its lines within its limits, with its consent; as the State, from time to time, through legislative enactments, has not only recognized the company's right to transact business within its limits, but regulated its business and affairs; and as, during the above

period, with the knowledge and acquiescence of the State, and in reliance upon such license, consent and acquiescence the company has expended large sums of money for the purpose of transmitting messages between the people of Arkansas, the State cannot withdraw its license and expel the company from its limits, even with respect to local business, without impairing the obligation of the company's contract with the State.

Such is the case as made by the bill; and the relief asked is a decree, declaring the statute unconstitutional and restraining any attempt to collect said fee of $25,050, and from imposing any of the penalties prescribed by it or by any provision therein (except the one requiring the designation of an agent upon whom process may be served in any suit brought against the Telegraph Company) and enjoining the defendant from attempting to revoke, or from proclaiming that he has revoked, its authority to do business in Arkansas.

The first contention of the appellant that this action is one against the State within the meaning of the Eleventh Amendment of the Constitution, declaring that the judicial power of the United States shall not extend to any suit in law or equity against a State by a citizen of another State. This contention must be held untenable on the authority of *Western Union Telegraph Company* v. *Andrews &c.*, this day decided. See p. 165, *post*.

But the vital question in the case is as to the constitutionality of the Arkansas statute. It is insisted by the defendant, among other grounds, that the provision in the statute requiring a foreign corporation, seeking to do business in the State, to pay a fee based upon the amount of its capital stock, for *filing* with the Secretary of State its articles of incorporation or association is a device which, in effect and by its necessary operation, under the guise of regulating intrastate business, imposes a tax on the interstate business of such corporation, as well as a tax on its property used and permanently located outside of the State.

Interpreting it according to the ordinary acceptation of its words, the statute does not discriminate between corporations engaged in interstate commerce and corporations whose business is intrastate in its character, so to make it clear that the State has not assumed to regulate or burden interstate business. Its words are unqualified and are made applicable to "*every* company or corporation incorporated under the laws of any other State, Territory or county, including foreign railroad and foreign fire insurance and life insurance, now or hereafter doing business in this State." § 1. "*Any* foreign corporation which shall fail to comply with the provisions of this act and shall do any business in this State," etc. § 2. "*All* corporations hereafter incorporated in this State and *all* foreign corporations seeking to do business in this State," etc.[1] According to the words of the statute, not unreasonably construed, every corporation of another State, seeking to do business in Arkansas, whether interstate or domestic, in order that it may do business of any kind in Arkansas, without coming into conflict with the statute, must file a copy of its authenticated charter with the Secretary of State; and it seems that before that officer will file such copy the corporation must pay to him a given amount based upon its capital stock, representing, necessarily, *all* its business, interstate and intrastate, as well as *all* its property everywhere, *beyond as well as within the State*. If the foreign corporation, without first paying those amounts, does business of any kind in the State it will incur not only the penalty of $1,000 for so doing but will forfeit its right to make any contract in the State, enforcible in law or equity—whatever its subject-matter—even if it be one relating to the business of the United States or to commerce among States. A statute of that kind would be palpably in conflict with the Constitution, and, especially an invasion of rights under that instrument of a corporation engaged in interstate commerce and seeking to do business in Arkansas.

But, it is said, that the statute in question should not be so

broadly construed. The reasons given for this contention are these: Before the statute here in question was passed there was in force in Arkansas a statute (act of February 16th, 1899, as amended by the act of May 8th, 1899, Kirby's Dig., chap. 31) which was very similar, in many respects, to the act of 1907, now under examination. The state Supreme Court had occasion to determine the scope and effect of that act of 1899. Its decision was handed down March 18th, 1907, while the Legislature of Arkansas was in session, and on the same day another decision was rendered holding material parts of that act to be repealed. *Western Union Tel. Co.* v. *State*, 82 Arkansas, 302; *Same* v. *State*, 82 Arkansas, 309. These decisions, as counsel suggest, virtually left the State without any statute prescribing fees to be paid by foreign corporations. Thereafter, on May 13th, 1907, the Legislature passed the statute here in question, known as the Wingo Act, which, with slight exceptions not necessary to be mentioned, was substantially like the act of 1899. The Supreme Court of the State, in *Western Union Tel. Co.* v. *State*, 82 Arkansas, 309, 314, construing the above act of 1899, had held that it was its duty, unless otherwise compelled by the plain, ordinary meaning of the words of a statute, to reject any construction that would bring it into conflict with the Constitution of the United States, *Grenada County* v. *Brogden*, 112 U. S. 261; Cooley's Const. Lim., § 218; *Atty. Gen.* v. *Electric Storage Battery Co.*, 188 Massachusetts, 239; that it was too well settled to admit of debate, that "it is beyond the power of the State under the guise either of a license tax or police regulation to impose burdens upon interstate commerce or to deny a foreign corporation the right to engage in such commerce in the State"—citing *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47; and *Brennan* v. *Titusville*, 153 U. S. 289. Its conclusion, in that case, was that the act of 1899 "must be construed to have been intended only to impose terms upon the right of a foreign corporation to carry on *intra*state business and it was a valid statute." Now, the

argument at the bar was that when the Wingo Act was passed, the Legislature must be deemed to have had in mind the judicial construction given to the previous act of 1899, and that it must be assumed that the same court would adhere to its already expressed views; so, that if a case ever came before it hereafter that involved the meaning and scope of the Wingo Act, expressed substantially in the same words as the act of 1899, the court would construe the Wingo Act, as it construed the act of 1899, as intended only to apply to intrastate business, and not as having been enacted *for the purpose* of burdening or imposing illegal terms for the transaction of interstate business by foreign corporations in Arkansas.

But the acceptance of this view would not remove the difficulty which confronts the State in the present case. According to well-settled rules of statutory construction, the validity of a statute, whatever its language, must be determined by its effect or operation, as manifested by the natural and reasonable meaning of the words employed. *Henderson* v. *Mayor*, 92 U. S. 259, 268. If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a State, or imposes a tax on its property outside of such State, then it is unconstitutional and void, although the state Legislature may not have intended to enact an invalid statute. But even if we should assume that the state court would construe the statute of 1907 as intended not to apply to interstate commerce but only to local or intrastate business, we are, nevertheless, informed by its decision in *Western Union Tel. Co.* v. *State*, 82 Arkansas, 302, 318, that, in the opinion of the state court, the statute so construed is valid, and therefore the Telegraph Company, in order that it may safely continue local business in Arkansas, *must* first pay into the treasury of the State certain amounts based on its *entire capital stock for simply filing its articles of incorporation* with the Secretary of State; and if it does not pay the specified fees, based on its entire capital stock, and yet continues to do intrastate busi-

ness in Arkansas, it will incur the prescribed penalty of *one thousand dollars* for continuing to do business in the State, and, in addition, lose its power or right to make any enforcible contract in the State. These are, in effect, *conditions* upon which the Telegraph Company, lawfully engaged in interstate business, and entitled to be in Arkansas for such business, is permitted to enter the State to do local business within its limits. And these conditions have been prescribed, notwithstanding the company has been permitted for many years, long before the act here in question was passed, to do local business in the State with its permission and acquiescence, and has invested there large sums of money in preparing to serve the public efficiently in that kind of business. The capital stock of the company represents, we repeat, *all* its business, property and interests throughout the United States and foreign countries, and the requirement that the company, engaged in interstate commerce, may continue to do a local business in Arkansas, and escape the heavy penalties prescribed, must pay a given amount (in this case $25,050), based on all its capital stock, merely for filing its articles of incorporation with the Secretary of State, is, in effect, a direct burden and tax on its interstate business, as well as on its property outside of the State. The case cannot be distinguished in principle from *Western Union Tel. Co.* v. *Kansas*, *ante*, p. 1, and *Pullman Company* v. *Kansas*, *ante*, p. 56, recently decided. The difference in the wording of the Kansas and Arkansas statutes cannot take the present case out of the ruling of the former cases. On the authority of the *Kansas cases*, and for the reasons stated in the opinions therein, we hold the statute in question to be unconstitutional and void, as illegally burdening interstate commerce and imposing a tax on property beyond the jurisdiction of the State.

Whether the statute of Arkansas is, in any particular, violative of the constitutional guaranty securing the equal protection of the laws, or of the guaranty prohibiting the deprivation of property, except by due process of law, or of any

other constitutional guaranty, it is not necessary now to consider. What has been said is sufficient for the determination of the present case, and we do not at this time go further than is indicated in this opinion. Suffice it to say that the defendant threatens to issue, in his official capacity, and publish, in the newspapers, a proclamation to the effect—no matter upon what specific grounds—that the Telegraph Company is not authorized, but is forbidden, under penalty, by the laws of Arkansas, from continuing to do local business in that State. Such a proclamation, which the court, as well as every one else, must know, would not only produce confusion in and irreparable damage to the company's business in Arkansas, but would, in effect, declare that the company is not only subject to a prescribed penalty of $1,000 for continuing to do local business in Arkansas, but is forbidden to make any contract whatever in that State that is enforcible in law or equity. In order to prevent the contemplated or threatened injury to the company the court below properly made a decree, perpetually enjoining the appellant, as Secretary of State, his agents and attorneys, from making proclamation that the Telegraph Company has no authority to continue doing business in Arkansas.

Mr. Justice Moody heard the argument of this case, participated in its decision, and concurs in this opinion.

The Chief Justice, Mr. Justice McKenna and Mr. Justice Holmes dissent.

The decree below must be affirmed.

It is so ordered.

WESTERN UNION TELEGRAPH COMPANY v. ANDREWS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

No. 8. Argued April 13, 14, 1909.—Decided February 21, 1910.

Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action; and such an action is not prohibited by the Eleventh Amendment of the Constitution of the United States. *Ex parte Young*, 209 U. S. 123.

THE facts are stated in the opinion.

Mr. Rush Taggart and *Mr. Henry D. Estabrook*, with whom *Mr. Geo. B. Rose* was on the brief, for appellants.

Mr. Hal L. Norwood, Attorney General of the State of Arkansas, with whom *Mr. Joseph M. Hill*, *Mr. William F. Kirby* and *Mr. Otis T. Wingo* were on the brief, for the appellees.

MR. JUSTICE DAY delivered the opinion of the court.

This case grows out of alleged actions about to be taken to enforce against the Western Union Telegraph Company the penalties denounced in the act of May 13, 1907, of the legislature of Arkansas entitled "An Act to permit foreign corporations to do business in Arkansas, and fixing fees to be paid by all corporations."

As this act has just been the subject of consideration in *Ludwig, Secretary of State*, v. *The Western Union Telegraph*

Company, decided to-day, *ante*, p. 146, it is unnecessary to set out at large the provisions of the statute in question.

The bill in this case was brought against the prosecuting attorneys of the seventeen judicial circuits of the State of Arkansas to enjoin them from instituting actions against the Western Union Telegraph Company to recover the penalties of $1,000 for each alleged violation of the act. It was averred in the bill that the defendant prosecuting attorneys would, unless restrained by the order of the court, institute numerous actions, as they had threatened to do, for the recovery of the penalties aforesaid. The learned District Judge sustained the demurrer to the bill and dismissed the case upon the ground that the action is, in effect, a suit against the State of Arkansas, and for that reason prohibited by the Eleventh Amendment to the Federal Constitution. The sole question presented upon this record is as to the correctness of that ruling.

Since the decision in the Circuit Court this court has decided the case of *Ex parte Young*, 209 U. S. 123, 155. In that case the previous cases in this court concerning the application of the Eleventh Amendment of the Constitution were fully considered, and it was then said by Mr. Justice Peckham, speaking for the court:

"The various authorities we have referred to furnish ample justification for the assertion that individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or a criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal court of equity from such action."

This doctrine is precisely applicable to the case at bar. The statute specifically charges the prosecuting attorneys with the duty of bringing actions to recover the penalties. It is averred in the bill, and admitted by the demurrer, that they threatened and were about to commence proceedings for that purpose.

The unconstitutionality of the act is averred, and relief is sought against its enforcement. As this case is ruled, upon the question of jurisdiction, by the case of *Ex parte Young*, it is unnecessary to consider the question further. Upon the authority of that case the decree of the Circuit Court dismissing the bill for want of jurisdiction is reversed and the cause remanded for further proceedings.

Reversed.